VOL. 37 (2d Series) NOVEMBER 3, 1972 No. 6

FEDERAL COMMUNICATIONS COMMISSION REPORTS
(37 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 37 (2d Series)

Pages 609 to 750

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

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Washington, D.C. 20402 - on a subscription basis

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F.C.C. 72-894

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 91.552 OF THE COMMISSION'S RULES TO PROVIDE THAT STATIONS LICENSED IN THE BUSINESS RADIO SERVICE MAY NOT BE USED FOR THE TRANSMISSION OF PROGRAM MATERIAL TO COMMUNITY ANTENNA TELEVISION (CATV) SYSTEMS	Docket No. 17824

REPORT AND ORDER

(Adopted October 5, 1972; Released October 11, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. When the Commission established the Community Antenna Relay Service (CAR) in 1965, it also adopted rules which provide that authorizations would no longer be granted in the Business Radio Service for microwave point-to-point radio stations for relaying television, standard, or FM broadcast signals to community antenna television (CATV) systems. *First Report and Order* in Docket 15586, 1 FCC 2d 897; and Section 91.552(e). The basic reason, for the Commission's decision, among others, was that the regulatory problems involved in CATV operations were markedly different from those involved in the Business Radio Service and, therefore, private CATV microwave relay systems should be accommodated and regulated in a separate radio service.

2. The instant proposal, which would prohibit microwave systems licensed in the Business Radio Service from carrying program material from any source to CATV systems, is merely a further step in the process and would implement the Commission's earlier basic decision. The comments filed [1] did not disagree with this basic proposition. However, when the Notice was issued, the Community Antenna Relay Service rules did not provide for the transmission of other than off-the-air broadcast signals by CAR licensed private systems, and the comments urged delay of finalization of the proposed rules until the CAR rules were also appropriately amended so as to avoid a hiatus. The CAR rules have since been amended and now permit transmission of locally originated programs and, therefore, action may be taken in this proceeding.

3. Accordingly, the proposed amendments will be adopted. However, as suggested by the comments of H & B Communications, CATV microwave relay systems currently authorized in the Business Radio Service will be permitted to carry off-the-air broadcast signals as well

[1] Comments were filed by: New Channels Corporation; National Trans-Video, Inc.; Cosmos Cablevision Corporation; Association of Maximum Service Telecasters, Inc.; Cox Cablevision Association, Inc.; H & B Communications Corporation; Times Herald Printing Company; All-Channel Television Society; The Jerrold Corporation; National Cable Television Association, Inc.

as program material obtained from other sources until they are required to discontinue their operations pursuant to Section 91.552(e) of the Commission's Rules. An amendment to Section 91.552(e) adopted in Docket No. 18916 (FCC 70–1272, released December 10, 1970), provides that previously "grandfathered" CATV microwave systems may be continued to be authorized in the Business Radio Service on a year-to-year basis until February 1, 1976.

4. Accordingly, IT IS ORDERED, pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, That effective November 20, 1972, Section 91.552(e) is amended as set forth in the attached Appendix.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

In Section 91.552 of the Commission's Rules, paragraph (e) is amended to read:

§ 91.552 Availability and use of service.

* * * * * * *

(e) Stations licensed in the Business Radio Service may not be used for the transmission of program material to cable television systems; *Provided, however,* That existing systems authorized to transmit programs for distribution on a cable television system prior to November 22, 1965, may continue to do so until not later than February 1, 1976, or until an earlier date if the Commission determines that the frequencies in the 12200–12700 MHz band are needed for operational fixed stations in the Safety and Special Radio Services. Expansion of these existing systems in the Business Radio Service is not contemplated and it is further provided that:

(1) No additional stations or frequencies will be authorized in this service;

(2) Replacement of equipment may be authorized only if the new equipment can be modified easily for operation in the 12700–12950 MHz band;

(3) The license term of all authorizations will not exceed one year.

F.C.C. 72-943

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 76, SUBPART B, OF THE COMMISSION'S RULES AND REGULATIONS CONCERNING PROCEDURES IN THE CABLE TELEVISION SERVICE

ORDER

(Adopted October 18, 1972; Released October 24, 1972)

BY THE COMMISSION:

1. In Par. 117, *Reconsideration of Cable Television Report and Order*, FCC-72-530, 36 FCC2d 326, 366, we stated that when there is a dispute as to whether the appropriate franchising authority is on the state or local level notice of filing of an application for a certificate of compliance should be served on all authorities that are claiming jurisdiction. In addition, in several states a state regulatory body has jurisdiction to confirm or deny franchises granted by local authorities, or otherwise regulate cable television. In either case, both the local and state authorities should be served with copies of the application for certificate of compliance. We have examined the Cable Television Rules and have concluded that certain editorial revisions are necessary to emphasize this procedural point.

2. First, we are amending the first part of Section 76.13(a)(7), -(b)(7), and -(c)(5), of the Commission's rules to insure that in cases where there are state and local authorities asserting jurisdiction over cable television, even where such jurisdiction is *pendente lite*, both are served with copies of the application for certificate of compliance.

3. Second, we are amending the second part of Section 76.13(a)(7), -(b)(7), and -(c)(5) of the Commission's rules to make it clear that, unless either the state or local body makes a copy of the application for certificate of compliance available for public inspection in the community of the system, the applicant will provide for public inspection of the application in said community.

4. Since these amendments are interpretive or relate to Commission procedure, the prior notice provisions of Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, do not apply.

Authority for the rule amendments adopted herein is contained in Sections 2, 3, 4(i) and (j) of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, That effective October 31, 1972, Part 76 of the Commission's Rules and Regulations is AMENDED as set forth in the attached appendix.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX

Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:
Part 76—Cable Television Service.
In § 76.13, paragraphs (a)(7), (b)(7), and (c)(5) are revised as follows:
§ 76.13 Filing of applications.

* * * * * * *

(a) * * *

(7) A statement that a copy of the completed application has been served on any local or state agency or body asserting authority to franchise, license, certify or otherwise regulate cable television, and that if such application is not made available by any such authority for public inspection in the community of the system, the applicant will provide for public inspection of the application at any accessible place (such as a public library, public registry for documents, or an attorney's office) in the community of the system at any time during regular business hours;

* * * * * * *

(b) * * *

(7) A statement that a copy of the completed application has been served on any local or state agency or body asserting authority to franchise, license, certify or otherwise regulate cable television, and that if such application is not made available by any such authority for public inspection in the community of the system, the applicant will provide for public inspection of the application at any accessible place (such as a public library, public registry for documents, or an attorney's office) in the community of the system at any time during regular business hours;

* * * * * * *

(c) * * *

(5) A statement that a copy of the completed application has been served on any local or state agency or body asserting authority to franchise, license, certify or otherwise regulate cable television, and that if such application is not made available by any such authority for public inspection in the community of the system, the applicant will provide for public inspection of the application at any accessible place (such as a public library, public registry for documents, or an attorney's office) in the community of the system at any time during regular business hours;

* * * * * * *

F.C.C. 72–872

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CHANNEL 3, INC., ASSIGNOR and VALLEY BROADCASTERS, INC., ASSIGNEE For Assignment of Station KVDO–TV, Salem, Oreg.	BALCT–448

SEPTEMBER 29, 1972.

VALLEY BROADCASTERS, INC.,
2225 Coburg Road,
Eugene, Oreg.

GENTLEMEN: This is with reference to the pending application for Commission consent to the voluntary assignment of license for television Station KVDO–TV, Salem, Oregon, from Channel 3, Inc. to Valley Broadcasters, Inc. (BALCT–448).

The application states that Valley's parent, Liberty Television, Inc., is the licensee of television Station KEZI–TV, Eugene, Oregon; 50% owner of the permittee for television Station KSYS–TV, Medford, Oregon; owner of several CATV systems within KVDO–TV's Grade B contour; and licensee of several television translator stations in Oregon. In addition, the application shows that the Grade A and B contours of Stations KEZI–TV and KVDO–TV overlap to a significant extent. Waiver of the Commission's duopoly rule (Section 73.636 (a)(1)) was requested in the application. Liberty's CATV holdings within KVDO–TV's Grade B contour would act to prohibit a grant of the subject application according to Section 76.501(b) of the Commission's Rules. Liberty has requested what amounts to a waiver of Section 76.501(b) since the acquisition of KVDO–TV would be prohibited without a waiver.

The Commission has given careful consideration to your application and has determined that, in view of the nature and extent of the prohibited overlap involved and the size and nature of the Salem television market, the public interest would not be served by a waiver of the above-cited multiple ownership rules and an outright grant of this application. However, because of the financial plight of the station and the danger of its going off the air thereby depriving Salem, the capital city, of its only television station until another buyer can be found, the Commission has concluded that the public interest would be served by a grant of the application subject to the following condition: "that the licensee assign the license of Station KVDO–TV to a fully qualified applicant within three years from the release date of this letter."

To ensure the timely and orderly compliance with this condition you are directed to file with the Commission a contract for the sale of the station by April 1, 1975 and to file the application for Commission consent to the transaction within two months thereafter. You are hereby notified that the Commission does not contemplate the

granting of any extensions of these specified filing dates. You are also notified that the Commission does not contemplate the issuance of a tax certificate in connection with your sale of KVDO–TV in accordance with the above condition.

We note that, in addition to a limited waiver of Section 73.636 of our multiple ownership rules, our action here also involves a waiver of Section 76.501 of our Rules because of Liberty's existing CATV interests within the KVDO–TV Grade B contour. You are advised that Tax Certificates will not be issued in connection with the future divestiture of your media interests as required by Section 76.501.

The grant of the above assignment application (BALCT–448) is also made subject to future determination of the grant fee.

Commissioners Burch, Chairman, Robert E. Lee and Reid concurring in the result; Commissioner H. Rex Lee dissenting and issuing a statement in which Commissioner Nicholas Johnson joins; and Commissioner Wiley dissenting.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Statement of Commissioner H. Rex Lee In Which Commissioner Nicholas Johnson Joins

I must dissent to the conditional grant of the application for assignment of the license of Station KVDO–TV, Salem, Oregon, from Channel 3, Inc., to Valley Broadcasters, Inc. By this assignment, Liberty Television, Inc., through its wholly-owned subsidiary, Valley Broadcasters, Inc., seeks to acquire the KVDO–TV license and all of the properties of Channel 3 in exchange for common stock of Liberty. By virtue of the transaction, the assignor's shareholders will receive Liberty stock equal in value to their investment in Channel 3 ($411,000) and to certain liabilities of the assignor ($190,500), which will be retired.

In the original assignment application (accepted for filing on August 24, 1971), the assignee proposed to operate KVDO–TV as a semi-satellite of KEZI–TV, Liberty's VHF television station at Eugene, Oregon, which is located some 65 miles south of Salem. As proposed in 1971, the assignee would originate some 5½ hours of local public affairs programming at KVDO–TV and would expand the station's broadcast day by over 50% to permit the carriage of ABC network and other programming via KEZI–TV. However, on September 23, 1971, two Oregon ABC affiliates, KOBI–TV in Medford and KATU–TV in Portland, filed petitions to deny the assignment application, alleging, *inter alia*, that the assignor had not complied with the three-year rule (Section 1.597); that the proposed operation of KVDO–TV does not qualify as a semi-satellite of KEZI–TV and that grant would therefore be proscribed by the Commission's duopoly rule (Section 73.636(a)(1)); and that grant will result in an undue regional concentration of control of mass media in contravention of Section 73.636(a)(2) of the rules.

On April 18, 1972, the assignee informed the Commission that ABC would not grant a network affiliation to KVDO–TV or consent to the rebroadcast of network programs via the Eugene station. As a result, on May 19, 1972, Valley Broadcasters filed an amendment to

the assignment application by which the semi-satellite operation was eliminated and a proposal to operate KVDO–TV as an independent station was substituted. The independent proposal contemplated a reduction in weekly operating hours from the assignor's present 68½ to 60. Shortly thereafter, KOBI–TV and KATU–TV withdrew their objections to the assignment application. On July 28, 1972, Liberty's counsel advised the Commission that Liberty would file an application to dispose of its interest as co-venturer in the permittee of Channel 8 in Medford (KSYS–TV) [1] and that the assignee was prepared to accept grant of the KVDO–TV assignment application subject to Liberty's disposition of the Medford broadcast interest. Counsel has also indicated that "the grant of the assignment will be accepted subject to divestiture by Liberty of any interest in KVDO–TV, when and if the Commission finds that such station can operate as a financially viable independent entity in Salem."

The assignment application raises several serious public interest questions, which effectively preclude my approval of even a conditional grant. First, since Liberty owns and operates numerous cable television systems within the predicted Grade B contour of KVDO–TV, Valley Broadcasters' acquisition of the station is proscribed by Section 76.501 of the rules. Liberty had originally requested that grant of the assignment application be conditioned on its petition for reconsideration in the cable rule making proceeding (Docket No. 18397) and that if divestiture is to be required, it be permitted to comply by August 10, 1973. However, in our *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, FCC 72–530, 25 RR 2d 1501, released June 26, 1972, we did not modify the provisions of the cable cross-ownership rules. Liberty's request for conditional grant now amounts to a plea for waiver of Section 76.501, which prohibits the acquisition, after July 1, 1970, of a television station whose Grade B contour overlaps the service area of a cable system.

Since no showing was made by the assignee to support such a request, I would not grant waiver of Section 76.501, which action is inconsistent with the Commission's announced desire to limit the participation of television licensees in cable systems located within their stations' service areas. While I agree with the majority's position that tax certificates should not be issued in connection with the future divestiture of media interests under Section 76.501, I would avoid the entire problem by not granting a waiver in the first place.

Grant of the assignment application also requires waiver of the duopoly provisions of our multiple ownership rules (Section 73.636 (a) (1)) since there is substantial overlap of the Grade A and Grade B contours of KVDO–TV and KEZI–TV. The essence of the assignee's waiver request in this regard is as follows: (1) Salem has an insufficient economic base to support a local independent station, especially in light of the strong position of the Portland stations in the market; (2) KVDO–TV has suffered substantial operating losses in its brief history; (3) Channel 3 has had no success in selling the station to others; and (4) state political leaders have expressed their desire to retain a local broadcast outlet in Salem, Oregon's capital city. While it may be true that the Commission has applied the duopoly restrictions in less than a consistent or rigid fashion in the past, waiver is

[1] The contract to sell KSYS–TV to Southern Oregon Education Co. was apparently signed on July 27, 1972, by Liberty Television, a joint venture.

obviously not justified here. For one thing, the degree of prohibited overlap is of considerable magnitude as the following table illustrates:

	Area (percent)	Square miles	Population (percent)	Number
KVDO–TV:				
Grade A overlap	32.8	800.8	32.8	50,198
Grade B overlap	61.6	5,950.4	38.0	307,373
KEZI–TV:				
Grade A overlap	9.2	792.7	15.0	50,198
Grade B overlap	37.3	6,038.5	91.0	307,313

Grant of the assignment will result in Grade A overlap consisting of 32.8% of KVDO–TV's Grade A population and 15% of KEZI–TV's Grade A population. Each station's Grade B contour will totally encompass the other station's city of license, and the combined Grade B contours of the two stations will serve over 50% of Oregon's total population (2,091,385). To my knowledge, no waiver of the duopoly rule has ever been granted where 91% of one station's Grade B population would be overlapped by a commonly-owned station.

While the information submitted by the parties here does indicate a serious deterioration of KVDO–TV's economic condition, it is insufficient to overcome the extensive overlap problem posed by the assignment. Moreover, it appears that, contrary to the assignee's claim, the Salem market has experienced a dynamic growth in terms of population, income and sales and that the state capital is capable of supporting an independent television station. This latter conclusion is reinforced by the fact that KVDO–TV nearly reached the break-even point during the pendency of the assignment application; that the assignee has made strenuous efforts to acquire the Salem station, including the recent agreement to dispose of Liberty's Medford interest and the late offer to dispose of KVDO–TV once it has become financially viable; and that no serious effort was made to sell the station to anyone other than the proposed assignee (whose counsel also represents the assignor). Therefore, it cannot be concluded that the present application represents the only means by which the operation of a television station in Salem can be assured. While I do appreciate the importance of a local outlet in Oregon's capital city, the fact remains that the assignor made no serious attempt to find another buyer for the Salem station.[2] In regard to the claim of the possible loss of the KVDO–TV service, it should be noted that the four commercial stations in Portland provide Salem with either city grade or Grade A service and that the Salem market is included in the area of dominant influence of all these stations. Since the parties to the assignment application have failed to present a compelling showing in support of waiver of the duopoly rule, the proposal should be denied outright.

In addition to the cable cross-ownership and duopoly problems inherent in the assignment, the proposal also raises a serious policy question regarding the regional concentration of control of mass

[2] In a September 18, 1972, amendment to the assignment application, the assignor supplied further information regarding its efforts to sell KVDO–TV to someone other than the proposed assignor. In the amendment, Channel 3 conceded that:

The station was not formally listed with a broker and its availability was not generally advertised in the trade press. KVDO–TV believed that prospective purchasers were limited and could be approached directly. Moreover, the station was deeply in debt, and if the possibility of a sale leaked out, it was feared that the staff might defect and that creditors might institute legal action to protect their interests.

media. With the acquisition of KVDO–TV, Liberty (the assignee's parent) will assume a dominant position along the Pacific coastline of Oregon. In the northwest section of the state, Liberty's influence will be felt through KVDO–TV and numerous cable systems. The southwestern portion of Oregon is already served by KEZI–TV and by an AM–FM combination in Eugene, 70% of which is owned by Liberty principals.[3] In addition, Liberty owns five translator stations in areas adjacent to its television facilities. In effect, the assignee will control mass media serving over 50% of the state's population with the approval of the KVDO–TV assignment. Such regional concentration of control by a licensee should be explored in an evidentiary hearing before any grant of the KVDO–TV proposal is made.

In summary, I would deny the assignment application since it runs counter to the diversification policies embodied in our cable cross-ownership and duopoly rules and since no adequate showing has been made to justify waivers of the Commission's rules. If waivers were appropriate, then a serious question is raised concerning Liberty's regional concentration of control, which would require further inquiry. These considerations preclude my approval of even a conditional grant. While I am aware of the serious financial condition of the Salem station, I do not find that factor to be dispositive here. The present plight of KVDO–TV is due, in part, to the assignor's voluntary action in contracting to sell the station and in curtailing programming expenditures to minimize losses during the pendency of the assignment application. As I've already indicated, the prospects for an independent television station in Salem appear to be better than the assignee would have us believe. In any event, I would find the loss of the KVDO–TV service to be an alternative preferable to the wholesale waiver of our rules and the emasculation of our diversification policies. I must admit that I have some serious doubts that the Commission will ever enforce the conditional grant now made, especially if the assignee invests substantial amounts of working capital in the Salem station and is unable to recover such an investment in three years. On the other hand, if Liberty accepts a conditional grant as just that, it may very well be forced into the position of withholding necessary funds from KVDO–TV for fear of losing its investment by a forced sale.

[3] KSYS–TV in Medford is also located in the southwestern portion of the state, but its effect is discounted here because of the recent agreement to sell the station to Southern Oregon Education Co. It should be noted that the majority does not condition grant of the KVDO–TV assignment on the disposition of KSYS–TV by Liberty even though the assignee has indicated its consent to such a condition.

F.C.C. 72-901

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
CORVALLIS TV CABLE CO., EUGENE, OREG.
Concerning Tax Certificate for Divestiture

OCTOBER 5, 1972.

CORVALLIS TV CABLE CO.
2225 Coburg Road,
Eugene, Oreg.

GENTLEMEN: On September 29, 1972, the Commission granted the application for voluntary assignment of license for television Station KVDO–TV, Salem, Oregon, from Channel 3, Inc. to Valley Broadcasters, Inc. (BALCT–448). That grant was conditioned on the requirement that the assignee dispose of the subject station, KVDO–TV, to a qualified buyer within three years of the date of the grant. In addition, the following condition was also added:

> We note that, in addition to a limited waiver of Section 73.636 of our multiple ownership rules, our action here also involves a waiver of Section 76.501 of our Rules because of Liberty's (Valley parent company) existing CATV interests within the KVDO–TV Grade B contour. You are advised that Tax Certificates will not be issued in connection with the future divestiture of your media interests as required by Section 76.501.

By letter dated October 2, 1972 (filed October 3, 1972), counsel for Valley Broadcasters, Inc., the assignee of KVDO–TV, requested that the Commission reconsider the above-quoted portion of the September 29, 1972 letter.

The Commission has given full attention to the request for reconsideration. We find that these CATV systems, which, must according to Section 76.501 of our Rules, be sold by August 10, 1973, were prior to our action already within the Grade B contour of commonly owned KEZI–TV, Eugene, Oregon, and thus entitled to a Tax Certificate upon their sale. In view of this, we have determined to delete that portion of our letter which would have denied a Tax Certificate upon the divesture of either KEZI or the CATV systems. Our ruling, in the letter denying the availability of a Tax Certificate are now restricted to the subsequent sale of KVDO–TV and therefore the above noted conditions, will be modified as follows:

> We note that, in addition to a limited waiver of Section 73.636 of our multiple ownership rules, our action here also involves a waiver of Section 76.501 of our Rules because of Liberty's (parent company of Corvallis) existing CATV interests within the KVDO–TV Grade B contour. You are advised that Tax Certificates will not be issued in connection with any sale of Station KVDO–TV.

Commissioners Robert E. Lee and Reid absent; Commissioners Johnson, H. Rex Lee and Wiley concurring in the result.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-908

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by STUART SCHEFTEL For Declaratory Ruling Re Cigarette Advertising	

OCTOBER 12, 1972.

STUART SCHEFTEL
c/o McKenna, Wilkinson & Kittner,
1150 Seventeenth Street NW.,
Washington, D.C.

DEAR MR. SCHEFTEL: This is in response to your "Motion for Declaratory Ruling" filed by your attorneys, with respect to the applicability of Section 6 of the Public Health Cigarette Smoking Act of 1969 (Cigarette Act) to the carriage of cigarette advertising in connection with your proposed 9A Multi-Customer Announcement Service.

It is asserted in this pleading that the 9A Multi-Customer Announcement Service has the technical capacity to accommodate up to 3,300 incoming telephone calls simultaneously on a single number. This service would be used by you for the principal purpose of providing to anyone calling this telephone number one-minute recorded announcements with horse racing results as received from tracks where the New York City Off-Track Betting Corporation (OTB) is handling races. You pointed out that off-track betting is a legal, and has become a major activity in the New York City area and that there is a considerable interest in the availability of racing results for the races which OTB is handling on any given day. The service may also be used to provide similar announcements with other sports results, at particular times when horse racing results are not of immediate interest.

You further state that the proposed 9A Multi-Customer Announcement Service will be supported economically by the sale of advertising messages, which will be incorporated into the pre-recorded 60-second announcements. A ruling is sought to determine whether cigarette advertising messages can be used in the announcements since it is alleged that while cigarette companies are interested in purchasing advertising in the service, they are not prepared to go forward because of uncertainty concerning the applicability of Section 6 of the Cigarette Act.

Section 6 of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. 1335, provides that "After January 1, 1971 it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." The legal issue raised by your petition is whether the 9A Multi-Customer Announcement Service which you propose to operate constitutes a "medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." It is conceded

in your pleading that the facilities of the New York Telephone Company which would be used to provide the 9A Multi-Customer Announcement Service "in some respects are subject to the Commission's jurisdiction under Title II of the Communications Act" but it is contended that they are in no way subject to the Commission's Title III jurisdiction and that the proposed service bears no relationship to broadcasting. Such a distinction is not, of course, reflected in the statute and it is not here necessary to resolve this latter point.[1]

Your contention that the statutory prohibition is limited to television and radio broadcasting or broadcast related services such as cable television finds no support in the statutory language used to define the scope of the prohibition. While there is little doubt that a major concern of the Congress was with these media of mass communication, the broad scope of the language used—any medium of electronic communication—clearly eliminates any limitation of the statutory ban simply to radio and television broadcasting and cable television.

There is no question but that your 9A Multi-Customer Announcement Service would frequently involve local telephone exchange operations which are described in and covered by tariffs filed with the state regulatory agency. However, as your petition indicates, the service would be available not only to local residents but also to persons in many other states who could gain access to the recorded announcements through the simple device of placing or dialing telephone calls from locations outside the State of New York. In the latter event the announcement service would seem to run afoul of Section 6 of the Public Health Cigarette Smoking Act of 1969.

In view of the foregoing, we are of the opinion that in Section 6 of the Public Health Cigarette Smoking Act of 1969 prohibits the carriage of cigarette advertising in connection with your proposed 9A Multi-Customer Announcement Service.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

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[1] If the service provided by the New York Telephone Company did include any microwave radio links, such facilities would have to be covered by radio authorizations under Title III.

F.C.C. 72-940

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of COMMUNICATIONS SATELLITE CORP. Application for Authority To Participate in the Implementation of an INTELSAT IV Program Change	File Nos. 9-CSS-MP-70, 11-CSS-MP-70

MEMORANDUM OPINION AND ORDER

(Adopted October 18, 1972; Released October 24, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND REID CONCURRING IN THE RESULT.

1. The Commission has before it a petition filed on May 22, 1972 and served on interested parties on July 27, 1972 by the Communications Satellite Corporation (Comsat), under Section 408 of the Communications Act of 1934, as amended, and Section 1.106 of the Commission's Rules and Regulations for partial reconsideration of the Commission's Memorandum Opinion and Order of April 19, 1972, 34 F.C.C. 2d 545 (1972).[1]

2. In its April 19, 1972 Order, the Commission approved, subject to certain conditions, Comsat's participation in the construction of three of the remaining four INTELSAT IV satellites.[2] The Commission allowed Comsat to enter into its accounts in a normal manner its proportionate share of certain specified amounts to be paid by INTELSAT for construction of the three authorized satellites. As to Comsat's continued participation in construction of the fourth INTELSAT IV satellite, the Commission interposed no objection but stipulated that such participation would be at Comsat's own risk. Comsat was further directed to account for those sums it expends associated with the construction of that satellite which reasonably can be determined to be the second Pacific region INTELSAT IV satellite in a manner prescribed by the Chief, Common Carrier Bureau, and that such sums shall not be included in the computation of any charges set forth by Comsat in its tariffs without further order by the Commission. Comsat's participation in construction of the three authorized satellites and the one for which special accounting conditions have been retained was limited for rate-making purposes to its proportion-

[1] The Commission also has before it the petition filed by the Hawaiian Telephone Company (HTC) opposing Comsat's petition for reconsideration and Comsat's reply thereto.

[2] In their original application, filed on June 5, 1970, Comsat sought Commission authorization to participate in a program for the construction of the four remaining INTELSAT IV satellites in addition to the four INTELSAT IV satellites already procured. In its Order of September 25, 1968, 14 F.C.C. 2d 790 (1968), the Commission had authorized Comsat's participation in the construction of the first four INTELSAT IV satellites.

ate share of the following amounts to be expended by INTELSAT for each satellite:

	In thousands
F–5	$5,636
F–6	4,354
F–7	5,086
F–8	4,832

It was further ordered that any amounts spent by Comsat for the three satellites for which authorization was granted as well as any additional claimed costs associated with them (no launch, incentive, launch vehicle, launch service or other program costs), to the extent not fully justified by Comsat, were subject to revision and modification by the Commission in the pending *Comsat Rate Case*, Docket No. 16070.

3. Comsat requests in its petition that the Commission reconsider its decision prohibiting Comsat from including in its computation of charges any costs associated with that spacecraft which can reasonably be determined to be the second Pacific region INTELSAT IV satellite. Comsat contends that since the decision for Comsat to enter the INTELSAT IV program was made two years ago after extensive deliberation by an international body and with full knowledge and concurrence of all revelant segments of the U.S. Government, it is incongruous for the Commission to reserve its initial judgment on such a decision until long after the time when the investment decision was made. Comsat argues that Commission allowance of Comsat's continued participation at its own risk in the construction of the second Pacific INTELSAT IV spacecraft did not leave Comsat with much choice to do anything other than to continue and that, at this point, it would be impracticable for Comsat to terminate its participation. Further, Comsat believes that it is at odds with accepted notions of equity to the rate payer for the Commission to exclude costs for the second Pacific INTELSAT IV spare at this time and to defer program costs other than delivery costs for the other three satellites until the *Comsat Rate Case* is resolved. It argues that to exclude and defer these costs prejudices further rate payers who must bear a greater share of these costs than if such costs were included in Comsat's rate base at this time.

4. Comsat further states in its petition that, subsequent to the filing of its application for authorization to participate in the construction of four additional INTELSAT IV satellites, it filed with the Commission four amendments [3] to its INTELSAT IV contract with Hughes Aircraft Company and further informed the Commission by letter [4] of the content of three of these four amendments. Comsat now

[3] These four amendments include: (a) Program amendment No. 9 filed with the Commission on September 29, 1970, in the amount of $7,076 for the redesign and installation of the separation switches and associated wiring for the F–5 through F–8 spacecraft. (b) Program amendment No. 12 filed with the Commission on January 20, 1971 in the amount of $312,500 to provide an accelerometer in the bearing and power transfer assembly (BAPTA) and a third earth sensor on the F–5 through F–8 spacecraft. (c) Program amendment No. 14 filed with the Commission on March 21, 1972 in the amount of $446,000 to provide the capability for a cross-connect between spacecraft fuel systems and 32 additional commands for the F–5 through F–8 spacecraft. (d) Program amendment No. 16 filed with the Commission on April 21, 1972 in the amount of $111,329 to provide for special torque testing of the BAPTA's on the F–7 and F–8 spacecraft; installation of a third BAPTA heater on the F–5 through F–8 spacecraft; and disassembly, inspection, cleaning, reassembly, and acceptance testing of the BAPTA's on the F–6, F–7, and F–8 spacecraft.

[4] Program amendment No. 9 was described in Comsat's letter to the Commission of August 19, 1970, program amendment No. 14 in Comsat's letter of October 16, 1970, and program amendment No. 14 in Comsat's letter of May 4, 1971. Program amendment No. 16 was not described in any correspondence between Comsat and the Commission other than in the filing of the actual amendment on April 21, 1972.

requests that the costs incurred in completing modifications to the F–5 through F–8 spacecraft pursuant to the aforementioned amendments be included in the construction authorization for these satellites. Comsat states that after allocating the costs of the amendments among the four satellites,[5] the per-satellite cost, rather than as set out in our April 19, 1972 Order and as noted above, should be as follows:

F–5	$5,829,844
F–6	5,580,130
F–7	5,314,466
F–8	5,060,465

To support their contention, Comsat states that the amendments reflect the experience gained to date in the INTELSAT IV program and incorporate tests and technical changes necessary to insure that these four satellites perform to specifications for their full seven-year design life. Comsat further argues that these amendments do not involve the basic communications capability of the satellites and would not change any of the specifications contained in Comsat's original application for a construction permit for these satellites.

5. HTC limits its opposition to Comsat's petition for reconsideration to Comsat's request for inclusion in its rate base of the costs of the second Pacific INTELSAT IV satellite. HTC contends that such inclusion is unjustified at this time because the Commission has pending a number of applications and policy questions relating to communication services in the Pacific[6] and also because a second INTELSAT IV spacecraft in the Pacific may prove neither needed nor useful since Pacific satellite service is currently provided by one INTELSAT III and one INTELSAT IV satellite.

6. In its reply to HTC's opposition filing, Comsat points out that the primary purpose of the second Pacific INTELSAT IV satellite would be its use as an operational spare facility to assure continuity of service, not to accommodate future traffic growth. Comsat further notes the operating anamolies it has experienced with the satellite presently being used as an operational spare in the Pacific, the INTELSAT III (F–4). In addition, Comsat states that even assuming satisfactory operation of this satellite, its capability as a full back-up facility for Pacific traffic will be exceeded by mid-1973 and thus it would be inconsistent with the public interest for the Commission to not authorize the second Pacific INTELSAT IV which can provide continuity of service and restoral capability to all points in the Pacific region.

Discussion

7. It appears to us that the following factors must be taken into consideration in reaching a decision on Comsat's petition for reconsideration of our April 19, 1972 Order as it relates to the need for a second INTELSAT IV satellite to serve as a Pacific region spare:

a. Current traffic volumes and the expected rate of traffic growth in the Pacific region with due regard to the need for continuity of service;

[5] To arrive at the above noted figures, Comsat allocated the costs of program amendments Nos. 9, 12, and 14, noted in Footnote 3 above, equally among the four spacecraft, F–5 through F–8, and the costs of amendment No. 16, as follows: $2,450 for F–5, $34,736 for F–6, $37,072 for F–7, and $37,071 for F–8.

[6] HTC notes that the Commission has before it multiple applications for domestic satellite service to Hawaii, an application for a third Pacific cable, the question of transponder and earth station lease arrangements as well as the cable-satellite policy question in regard to the Pacific.

b. alternative means now available to insure continuity of service in the Pacific region;

c. the present reliability of those facilities now used to satisfy traffic requirements and protect against loss of service in the event of a failure in existing facilities; and

d. the impact that a decision now regarding a second Pacific INTELSAT IV satellite to serve as a spare would have on the Commission's consideration of other applications regarding future Pacific regions facilities.

8. Pacific region traffic requirements are currently being satisfied by a number of cables, two satellites,[7] and to a limited degree, high-frequency radio facilities. The cable circuits available to the U.S. carriers are being fully utilized to meet existing traffic requirements with certain minor exceptions on some Pacific cable segments. The U.S. carriers are presently using some 604 cable circuits and some 847 satellite circuits between U.S. points and between U.S. and foreign points in the Pacific region. As of the end of July 1972, the INTELSAT system in the Pacific was carrying some 900 circuits serving all Pacific points in the system. Without lengthy discussion of the current projections regarding future traffic in the Pacific, it is reasonable here to assume that, based on past experience, traffic growth will be in the range of 18% to 23% per year over the next several years.

9. It is, therefore, clear that significant and increasing volumes of U.S. traffic are now being carried over existing facilities and that there is a substantial need to provide for adequate protection in case of failures in any of these facilities. The INTELSAT IV (F–4) satellite, launched January 22, 1972, has proved to be completely reliable to date and has sufficient capacity to accommodate foreseeable future satellite traffic growth over its seven-year life expectancy. However, the III (F–4) satellite, launched May 21, 1969, and now providing a back-up for the IV (F–4), has recently experienced operational difficulty due to problems with the mechanical despun antenna electronics. It has exhibited high antenna motor current during the current eclipse season with a total loss at one point of despin control causing the antenna to spin with the body of the spacecraft. Accordingly, it is reasonable to conclude that the INTELSAT III (F–4) cannot be relied upon to provide any proper service during eclipse seasons. Past experience with the INTELSAT III series of satellites indicates that, after abnormalities are encountered in the despin mechanism, the likelihood of a failure at any time is increased. In addition, even assuming the III (F–4) satellite to be fully operational, increases in satellite traffic will make a conversion from an INTELSAT IV to a III satellite, in the event of a failure of the IV, difficult. Moreover, current projections indicate that in case of an INTELSAT IV failure the traffic to be transferred may exceed the capacity of the III satellite before the end of its projected lifetime in mid-1974.[8] In its recent filing requesting Commission authorization to launch, position in the Pacific, and test the INTELSAT IV (F–7), Comsat has indicated its desire to launch such satellite as early as December 1972.[9] A launch at that

[7] INTELSAT IV (F–4) and INTELSAT III (F–4). The III (F–4) serves as a spare in case of a failure of the IV (F–4); a portion of U.S. mainland-Hawaii traffic has been, for diversity, provided over the III (F–4).

[8] Comsat believes that Pacific satellite traffic requirements will exceed the III capacity in mid-73.

[9] The Commission is taking appropriate action on Comsat's request to launch, position and test the IV (F–7) in another authorization.

time would provide the necessary reliable back-up capability presently not available with the III (F–4), to insure continuity of satellite service.

10. The Commission is fully aware of pending applications [10] to construct, land and operate additional cable facilities in the Pacific region. A policy determination regarding future licensing of U.S. Pacific facilities is yet to be finally concluded. Accordingly, we emphasize that any action herein concerning the need to provide a facility to protect a major portion of U.S. Pacific traffic against catastrophic in-orbit satellite failure is without prejudice to any future action regarding the need for additional Pacific facilities to satisfy growth requirements and the appropriate mix of cable and satellite facilities.

11. We are not approving Comsat's participation in the construction of the IV (F–7) satellite in order to provide for a second major satellite stream in the Pacific, but rather for the purpose of providing a Pacific spare satellite. In those cases where it is desirable and reasonable and does not limit its back-up capability, we would not object to the use of a spare Pacific satellite to provide some degree of diverse satellite routing. However, permitting such use would not constitute a finding concluding such satellite to be a major facility for "reasonable parity" purposes between cable and satellite facilities.

12. We believe that the above clarifications of action taken herein will serve also to relieve HTC of some of its concerns expressed in comments filed relating to the facility and regulatory situation in the Pacific region, especially between Hawaii and the U.S. Mainland.[11] The foregoing should also relieve HTC of its concern that approval of Comsat's participation in the construction of a spare INTELSAT satellite serving the entire Pacific basin will or can have a material impact upon our consideration of applications for domestic satellite service to Hawaii.[12]

13. In regard to Comsat's requested reconsideration of our decision limiting the cost of the remaining four INTELSAT IV satellites that may be included in Comsat's rate base, it is important to note that our primary reason for not considering the costs associated with the contract amendments noted above was the fact that Comsat had not specifically sought our authorization for their inclusion. We are of the opinion that our previous decisions authorizing Comsat's participation, which specified a limitation on the amount to be expended for the construction of certain INTELSAT IV satellites,[13] did require

[10] The Commission has pending a joint application filed by American Telephone and Telegraph Company (AT&T) and HTC for authority to construct, land and operate an 845 circuit SF type cable between the U.S. Mainland and Hawaii. The U.S. international record carriers have filed separate applications for authority to participate in this cable project. Recently, AT&T has tendered for filing with the Commission an application to construct, land and operate an 845 circuit SF type cable between Hawaii and Okinawa via Guam.

[11] We note, in this regard, that HTC's comments were filed before the operational difficulties were experienced with the INTELSAT III (F–4) satellite. The Commission on October 6, 1972 received comments from HTC relating to the operational difficulties of the III (F–4) in response to Comsat's request to launch, position and test the IV (F–7).

[12] The question of transponder and earth station lease arrangements between the U.S. mainland raised by HTC in its comments is presently the subject of Commission consideration in a rate case (Docket No. 19552).

[13] In the Commission's *Memorandum Opinion and Order* of October 28, 1969 (F.C.C. 69–1169), the Commission waived the requirements of Section 319(d) with respect to Comsat's participation in the construction of the INTELSAT IV F–5 and the F–6 spacecraft under a then existing option Comsat had with a delivery price of $10,990,000 for the two spacecraft. Also, in the Commission's *Memorandum Opinion and Order* of December 31, 1969 (F.C.C. 69–1413), the Commission waived the requirements of Section 319(d) with respect to Comsat's participation in the construction of the INTELSAT IV F–7 and F–8 spacecraft provided that the cost of such spacecraft did not exceed the sum of $9,918,000 plus any no launch payment so far agreed on with the contractor.

109–013—72——2

Comsat to seek and receive additional authorization from this Commission in order to participate in any construction which exceeded the ceiling imposed by such order and authorization. These amendments added substantial costs to the delivery price of the F–5 through F–8 spacecraft, thus exceeding the specific delivery costs in our interim authorizations for these spacecraft. We, therefore, reject Comsat's contention that Commission authorization was not required for these contract amendments.

14. Comsat's petition for partial reconsideration requests that the Commission reconsider its April 19, 1972 Order in light of the additions to the construction costs of the F–5 through F–8 spacecraft reflected in the contract amendments and other documents describing these amendments previously filed by Comsat. In this instance, because of the ambiguities involved in the procedures to be followed concerning the need for and timing of further Commission authorization, we are persuaded to treat Comsat's petition for reconsideration as a request to amend our interim authorizations so as include the additional construction costs of these amendments. Our conclusion is based on the fact that these amendments incorporate technical changes that will help to insure that the INTELSAT IV F–5 through F–8 spacecraft perform to specifications for their design life. We will thus approve Comsat's request to include its proportionate share of these costs in its appropriate accounts, i.e., its proportionate share of the original delivery cost to INTELSAT of each satellite plus its proportionate share of the costs to INTELSAT of those parts of contract amendments Nos. 9, 12, 14 and 16 that involve further construction on the F–5 through F–8 spacecraft. Should there be any further anticipated increases in the construction costs of this program, Comsat shall seek, before proceeding with such construction, such Commission authorizations as may be required to so participate. Without such Commission approval as is required for further construction, Comsat would be participating in unauthorized construction, the costs of which could not be included in any accounts used in computing its rates and charges.

ORDER AND AUTHORIZATION

IT IS ORDERED, That approval is hereby given, subject to the terms and conditions stated below, to Comsat's participation in the construction of the INTELSAT IV (F–7) satellite which has been determined to be the second Pacific region INTELSAT IV satellite and that further participation by Comsat shall be in accordance with appropriate approvals as required by provisions of the Communications Satellite Act of 1962, as amended, and the Communications Act of 1934, as amended.

IT IS FURTHER ORDERED, That the condition contained in the Commission Order of April 19, 1972, regarding Comsat's participation in the construction of the aforementioned satellite and requiring that sums expended by Comsat for construction of such satellite should not be included in the computation of any changes set forth by Comsat in any of its tariffs without further order by the Commission, IS HEREBY CANCELLED AND REVOKED.

IT IS FURTHER ORDERED, That Comsat may, subject to the decision in the *Comsat Rate Case*, Docket No. 16070, include in its books of account for rate-making purposes sums to cover its proportionate share of the following construction costs to INTELSAT of

the respective satellites, which amounts include those costs in program amendments Nos. 9, 12, 14 and 16 that relate to such spacecraft construction:

F–5	$5,829,844
F–6	5,580,130
F–7	5,314,466
F–8	5,060,465

IT IS FURTHER ORDERED, That no sums, in addition to those specifically set out above, with regard to the construction of the INTELSAT IV F–5 through F–8 shall be used in computing rates until approval for such action is given by the Commission.

IT IS FURTHER ORDERED, That Comsat shall not participate in that launch or in-orbit testing of the satellite for which its participation in construction is herein approved unless and until authorized by the Commission upon appropriate application filed 30 days before proposed test in orbit by Comsat and showing that the satellite has been constructed in accordance with the specifications now on file with the Commission and are capable of operating within the parameters attached to our April 19, 1972 Order as well as a showing in detail of the associated launch and other costs;

IT IS FURTHER ORDERED, That Comsat shall not furnish any services or facilities via the satellite for which its participation in construction is herein approved unless and until specific authorization shall have been granted by the Commission upon appropriate application therefor;

IT IS FURTHER ORDERED, That Comsat shall not participate in any substantial modifications or incur any additional costs in the construction program herein authorized without approval of the Commission;

IT IS FURTHER ORDERED, That all terms and conditions of our April 19, 1972 Order shall be fully effective except as modified herein.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-301

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
DOWRIC BROADCASTING CO., INC., BRUNSWICK, GA.	Docket No. 19448 File No. BP-18331
INTEGRATED BROADCASTING CO., INC., JACKSONVILLE, FLA.	Docket No. 19450 File No. BP-18493
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted October 17, 1972; Released October 19, 1972)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. This proceeding, involving the mutually exclusive applications for standard broadcast stations of Dowric Broadcasting Company, Inc. (Dowric), Brunswick, Georgia, James Harry Moye (Moye), Waycross, Georgia, and Integrated Broadcasting Company, Inc. (Integrated), Jacksonville, Florida, was designated for hearing by Commission Order, FCC 72-162, released February 24, 1972.[1] In the designation Order, the Commission specified various issues including, among others, a Section 307(b) issue. Presently before the Review Board is a petition to enlarge issues, filed May 1, 1972, by Dowric requesting the addition of a contingent comparative issue.[2]

2. Dowric, in its petition, argues that the present case cannot, "in all probability", be decided on Section 307(b) grounds. According to Dowric, its specified community, Brunswick, Georgia, has a population of 19,550 and has five aural transmission facilities; Integrated's community, Jacksonville, Florida, has a population of 528,865 and fourteen broadcast stations. Thus, alleges Dowric, no applicant can be awarded a preference based on the need for a new transmission facility. In addition, Dowric submits coverage maps of each applicant (Exh. 2) showing the communities within or near the proposed 0.5 mv/m (normally protected) contour of each applicant. Dowric then lists (Exh. 1) the stations located in these communities and argues that these stations would "obviously" provide service to "at least some portion" of each applicant's area. The exhibits list ten cities and twenty-two stations within the 0.5 mv/m contour of Integrated. As to its own proposal, Dowric states there are no cities other than Brunswick, its specified station location, within the proposed 0.5 mv/m contour. One station, Dowric argues, just outside its 0.5 mv/m contour, would provide some service to its proposed area. From the above facts, Dowric urges, it may be concluded that there are a "substantial" number of services available in each applicant's proposed service area; no white or gray areas exist; and, therefore, it would be probable that a 307(b) preference could not be awarded. Further, petitioner states, since Bruns-

[1] By Order, FCC 72M-1079, released August 28, 1972, the Administrative Law Judge granted the Petition for Dismissal, filed August 3, 1972, by Moye and dismissed his application with prejudice. Therefore, the Board will omit discussion of the pleadings involving the Moye application unless they remain relevant.

[2] Also before the Board are oppositions, filed May 16, 1972, by Integrated, Moye and the Broadcast Bureau.

wick has a 44% black population and Dowric's proposal includes black ownership and staffing, as well as black-oriented programming, the Commission will be deprived of a chance to encourage a minority owned and operated station unless the issues are enlarged as requested. And, finally, urges Dowric, in order to avoid the probability of a remand on the comparative qualifications issue after a lengthy hearing, the requested issue should be added now. Dowric concedes that its pleading is late filed, but urges its consideration on "public interest factors."

3. In their oppositions, Integrated, Moye and the Bureau stress Dowric's failure to comply with Section 1.229(b) of the Commission's rules in that the petition is admittedly late (by six weeks) and no attempt has been made to demonstrate good cause for the delay. As to the substance of the petition, Integrated argues that the proposals are significantly different from each other and, thus, the Administrative Law Judge will be able to make a decision without the need of a contingent comparative issue. For example, argues Integrated, neither applicant proposes to serve substantial areas in common; the number of aural transmission facilities available and the population of each community vary considerably; and no showing has been made by Dowric as to differences in other 307(b) considerations of the communities such as economic and political activities, growth rates, etc. Moye, in his opposition, stresses that Dowric's petition provides no new information which the Commission did not consider before issuing its designation Order. And, finally, both Moye and the Bureau note that Dowric has failed to support its petition with a full engineering showing to substantiate its allegations as to the available services in the applicants' coverage areas and the alleged lack of white and gray areas.

4. The Review Board will deny the present petition. Not only is the petition six weeks late, but the applicant has not even attempted to make a showing as to why the petition was so tardy other than a vague allegation of "public interest factors". Therefore, since no good cause has been shown to justify the untimely filing, the petition will be denied. See *Lester H. Allen*, 20 FCC 2d 478, 17 RR 2d 914 (1969); *Media, Inc.*, 22 FCC 2d 886, 19 RR 2d 2 (1970). Moreover, aside from the procedural deficiency, petitioner's allegations are insufficient to warrant the requested issue. It is well established that a contingent comparative issue will be specified where there is a "sufficient possibility" that a decision cannot be made under a 307(b) issue. *Charles County Broadcasting Co., Inc.*, FCC 64R–207, 2 RR 2d 121. Here, it appears that there is a substantial disparity in population and available transmission service between Brunswick and Jacksonville, no other facts regarding the nature of these communities have been alleged, the proposed service areas of the two applicants do not substantially overlap, and the petitioner's allegations regarding other services available are inadequately documented. Under these circumstances, the likelihood of resorting to a comparative issue appears too remote at this time to warrant addition of the requested issue. *Cf. Flathead Valley Broadcasters*, 1 FCC 2d 1199 6 RR 2d 493 (1965).

5. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed May 1, 1972, by Dowric Broadcasting Company, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-659

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
MARK LANE
Concerning Fairness Doctrine Re Station
KTLA-TV, Los Angeles, Calif.

JULY 19, 1972.

TRACY A. WESTEN, ESQ.,
Stern Community Law Firm,
2005 L Street NW.,
Washington, D.C.

DEAR MR. WESTEN: This refers to a complaint and request for declaratory ruling [1] filed by you on behalf of Mark Lane (1) alleging that Station KTLA-TV, Los Angeles, California, deleted certain comments of Mr. Lane, thus engaging in censorship in violation of the First Amendment and the Communications Act of 1934; (2) requesting the Commission to notify licensees that they may not "blip out" or otherwise censor the comments of guests on talk programs when such comments fall short of "illegal" speech and the remainder of the program is broadcast without editing; and (3) requesting the Commission to require KTLA-TV to provide Mr. Lane with time to convey the content of his deleted remarks.

I. COMPLAINT

The complaint alleges the following as giving rise to this complaint: Jane Fonda and Mark Lane were invited to appear on "The Virginia Graham Show" to discuss the Vietnam war and the Movement for a Democratic Military. In an apparent attempt to balance these views, representatives of the armed forces, the John Birch Society, and Students for a Democratic Society were invited to ask questions from the audience. "During the show's taping, a Mr. John Cole rose from the audience, described himself as an 'agent' for a governmental intelligence agency . . ., and proceeded to attack the 'Movement for a Democratic Military' in derogatory and critical terms. . . ." Mr. Lane then came on stage and stated that he had written *Conversations with Americans*, a book on "war crimes," and that he had recently interviewed Mr. Cole. Mr. Lane stated that during his interview with Mr. Cole, Mr. Cole indicated that at the "Interrogation, Prisoner of War School" at Fort Meade, Maryland and Fort Holabird, Maryland, he had been trained to use torture to extract information from prisoners and that he had admitted the use of those techniques to torture and kill Vietnamese in order to obtain information. Mr. Cole did not deny any of Mr. Lane's statements, but rather said the story had something

[1] Section 1.2 of the Commission's Rules state that "The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."

to do with his "cover." Mr. Lane replied that he had obtained signed affidavits and releases from Mr. Cole as well as tape recordings and films of the interview which he would make available to anyone desiring confirmation. Mr. Lane repeated this offer to the producers of "The Virginia Graham Show" after the taping of the show.

Mr. Steve Jaffe, press agent for Miss Fonda, attended a prescreening of the program and, at that time, the show was "completely intact—without sound failures or deletions of dialogue of any kind. * * *" When the program was broadcast by KTLA–TV (on June 23, 1970), it proceeded normally until Mr. Lane was introduced, at which time the audio portion of the program went silent. An off-screen voice stated, "We are having difficulty with the audio portion of our program. Please bear with us." When Mr. Lane's "silent" statement was finished a commercial was presented and the sound returned. The next day Mr. Jaffe and Mr. Lane made telephone calls which revealed that the deletion was not due to technical difficulties but was the result of a "programming decision" by the KTLA–TV management. The producer of "The Virginia Graham Show" stated he did not delete the material and a KTLA–TV employee said the deletion was made by the KTLA–TV Program Director.

The complainant suggests that the incident related above may be only one example of a general policy by KTLA–TV to delete comments which it does not like. The complaint cites two other alleged instances. In one, Mr. Jaffe states that Mr. Lane was subsequently invited to appear on the "Robert Dornan Show," but the producer of the show said he would first check with KTLA–TV's Program Director because a "controversial guest" might result in "static" from the station. The complaint states Mr. Lane was not allowed to appear because the KTLA–TV Program Director feared Mr. Lane "might say something they would have to cut out—as they did on 'The Viriginia Graham Show.'" The complainant also states that the station's complaint file contained a letter from a listener who complained that he was watching a discussion about marijuana on the "Steve Allen Show"; that when one guest began to express views "counter to some of the 'safer,' more conventional views already expressed" he was "cut off by a commercial, following which the screen went blank and the station put up a 'please stand by—technical difficulties' sign"; and that when the program was resumed the show was ending.

II. LICENSEE'S RESPONSE

In response to the complaint, the licensee states that it does not produce, have ownership interest in, or determine the content of "The Virginia Graham Show." Regarding the deletion of Mr. Lane's remarks, the licensee states that the Director of Programming was notified by RKO General, the owner of the program, that Mr. Cole had threatened a libel suit if certain of Mr. Lane's statements were broadcast. A text of Mr. Lane's statements was provided to the station's attorney who stated that he believed that the remarks were defamatory per se and advised the station that it should either delete the audio portion of the statement or not carry the program. The attorney stated that because the station had "been put on notice by Mr. Cole, KTLA could not evoke the retraction statute and the station would be exposing

itself to substantial punitive damages." [2] The licensee states the issue is not freedom of speech but rather "whether a station has the right, after consulting with competent counsel, to eliminate matter which is defamatory per se where a law suit has been threatened. * * *"

The licensee states that since the broadcast occurred almost a year prior to the Commission's inquiry,[3] neither the staff announcer nor the duty director can recall the circumstances surrounding the announcement made during the twenty-five second deletion of the audio portion of the program. The licensee states that although the Program Department did not order such an announcement to be made, the apparent explanation would be that the staff announcer was unaware of the deletion and, since technical difficulty is the usual reason for loss of the audio portion of program, the announcer assumed that to be the case in this situation and made the announcement to that effect.

The licensee has also submitted statements by members of its staff and its attorney regarding the other alleged incidents cited in the complaint. The material indicates that Mr. Lane did appear on the "Robert K. Dornan Show" on December 13 and December 20, 1970, and that no cuts were made during the remarks about marijuana on the "Steve Allen" program but rather technical difficulties caused the screen to go blank.

The licensee has also submitted a letter which indicates that prior to the taping of "The Viriginia Graham Show," Mr. Cole wrote to Mr. Lane revoking the permission which he had granted to Mr. Lane to use the interview and stating that all statements made therein were false.

III. COMPLAINANT'S REPLY

In reply to the licensee's response the complainant asserts that the licensee did not dispute the complainant's position on improper audio censorship; that under California law Mark Lane did not slander Mr. Cole and therefore the licensee could not be held liable for the broadcast of such nonslanderous statements; [4] that Mr. Lane's First Amendment right to speak over the air waves controlled by KTLA–TV should receive the same degree of protection that the *New York Times Co.* v. *Sullivan* case, 376 U.S. 254 (1964), provides to KTLA–TV against civil liabilities; that KTLA–TV has not shown that its "censorship" was reasonable; and that KTLA–TV's "censorship" was apparently motivated by a reluctance to afford Mr. Cole rebuttal time under the personal attack doctrine, or to resist a frivolous defamation suit in court.

The complainant contends that there are several reasons why a licensee may not delete remarks—even defamatory—of a guest on a talk-discussion show and cannot be held liable for their broadcast; for example, if the person attacked is present and able to rebut or deny the

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[2] The licensee deleted the italic portion of the following statement by Mr. Lane:
"MARK LANE—I would like to comment on the last gentleman who asked the question because I conducted many hours of interviews with him—yeh, with Mr. Cole. I'm sorry he didn't tell everyone the same things that he told me in the tape recording and signed for release *and that is that he was a prisoner of war interrogator in Viet Nam for the American Army—that he participated in torturing to death up to 200 people while he was in Viet Nam. And I'm sorry that he didn't tell everyone about his activities. Because I think we could have learned a lot about the American presence there and he also could have told us how he was trained to use electrical methods.* * * *"

[3] The program was aired in June 1970. The complaint was not filed until May 1971.

[4] Mr. Westen has submitted numerous references to the California Civil Code and to applicable court cases and this detailed information as well as all other pleadings in this case are on file in the Commission's Washington, D.C. office and are available for public inspection.

charges, and, in any event, he may request time to respond under the Commission's personal attack rules. The complainant asserts that the Supreme Court "has acknowledged that the right to respond, whenever a feasible alternative, takes precedence over the right to recover damages against the public medium chosen." He cites the following language from *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 47 (1971), n. 15:

"* * * Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesirable press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly."

IV. DISCUSSION

This complaint questions the right of the licensee to delete a portion of Mr. Lane's comments and raises issues as to the Commission's proper role under such circumstances.

In a recent case that raised issues similar to those in this complaint the Commission discussed the scheme of the Communciations Act of 1934, as follows:

"Under section 3(h), the Congress explicitly defines a broadcast licensee as not a common carrier. He can and must make reasonable judgments as to the programming presented over his facilities. Indeed, that is his affirmative responsibility under the Act—and in a real sense it is the essence of our broadcasting system, which rests its confidence on the independent decisions of many entrepreneur and not on an agency of the Federal Government." Letter to *Honorable William H. Harsha*, 31 FCC 2d 847 (1971).

Were a licensee not allowed to make reasonable programming decisions and "were deemed to be a common carrier, having to present any matter brought to him which was not obscene, etc., the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt." Letter to *Honorable Richard L. Ottinger* printed as an attachment to the letter to *Honorable William H. Harsha*, *supra*.

However, a licensee's programming decisions must be based on his obligation to serve the needs and interests of his community, and we have stated we would be concerned if a licensee rejected "a presentation of a view on the basis of a policy that he never presented views with which he disagreed, or views of women, or blacks, or red-headed men." *Ottinger*, *supra*. (See also letter to *Albert H. Kramer* (Back Alley Theater) 25 FCC 2d 705 (1970). In the Back Alley Theater case at page 707 we stated:

"* * * a serious public interest question would be presented if in its over-all programming a licensee ignored the needs of a substantial segment of his community or, for example, arbitrarily refused to present members of an ethnic group, or their views. Refusal to present members of such a group, either as such or in integrated situations with members of other groups, would constitute discrimination in programming. It is not enough, however, simply to state that a speaker has been censored because a licensee has edited or rejected a particular piece of program matter. Such exercise of the licensee's judgment in programming occurs thousands of times a year, as to which claims could be made that the licensee was serving some improper purpose or policy. Absent substantial extrinsic evidence of motives inconsistent with the public interest, the Commission should not and will not intervene in this continuing program practice."

Regarding your First Amendment claim, the Constitution does not guarantee any person the use of any particular platform for the expression of his views and we believe that the licensee in this case was neither obligated to broadcast the syndicated program on which Mr. Lane was a guest, nor to present his appearance without editing it. The Commission expects a licensee to maintain control over, and assume responsibility for, all material broadcast. In the present case, the licensee states and its counsel confirms that deletion of Mr. Lane's remarks was based upon counsel's advice that the remarks were defamatory per se and their broadcast would expose the licensee to substantial punitive damages. Thus, the licensee's decision to delete the remarks does not appear to have been arbitrary, capricious or based upon a policy of excluding views with which it disagreed. See letters to *Harsha* and *Kramer*, supra. Since the licensee acted because of advice of counsel, we do not intend to become involved in arguments as to whether in fact the licensee would have been subject to recovery of damages had it broadcast the material.

With regard to the announcement made during the silent period, serious questions would be raised concerning a licensee's qualifications if it deleted material and deliberately misrepresented to the public that the interruption was caused by technical difficulties. However, we have no evidence here that the licensee either authorized or condoned such announcements, and in view of the passage of time since the 1970 broadcast, we believe that additional inquiry into this aspect of the complaint would not be likely to provide any further substantial evidence.

Based on the foregoing, we cannot find that the licensee acted unreasonably or in violation of the First Amendment or the Communications Act. Therefore, no further Commission action appears warranted and the relief you request IS DENIED.

Commissioner Johnson dissenting and issuing a statement; Commissioner Reid absent; Commissioner Hooks not participating.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Opinion of Commissioner Nicholas Johnson

On June 4, 1970, Mark Lane, attorney, author, and petitioner in this case, appeared with actress Jane Fonda on the "Virginia Graham Show" to discuss the Vietnam War and the Movement for a Democratic Military. The show was aired in Los Angeles by KTLA–TV. Representatives from the armed forces, the John Birch Society, and the Students for a Democratic Society were invited by the show's producers to ask questions from the audience.

During the show's taping, and prior to Mr. Lane's introduction, Mr. John Cole rose from the audience, described himself as an "agent" for an unidentified governmental intelligence organization, and sharply criticized the members and objectives of the Movement for a Democratic Military. After being introduced, Mr. Lane advised the audience that he had previously interviewed Mr. Cole while researching a book on "war crimes" entitled *Conversations with Americans.*

During that interview, said Mr. Lane, Cole admitted that he had been trained by the government to use torture to extract information from

prisoners. According to Lane, Cole also admitted to having put his learning to use in Vietnam.

Unlike the studio audience, none but an accomplished lip-reader in the greater television audience was able to comprehend Mr. Lane's report when the show was aired some two weeks later. The station deleted Lane's words, leaving the visual portion of the episode intact while an off-stage voice explained: "We are having technical difficulty with the audio portion of our program. Please bear with us."

The majority has, indeed, borne with the station. Yet, the majority is fully aware that KTLA's audio equipment was functioning without fault, that the station deceived the viewing public, and that the station's present justification for censoring Mr. Lane is questionable at best. I dissent.

The majority notes that a licensee's programming decision may not contravene the public interest. I agree. Yet, the majority then suggests that so long as a licensee does not embark upon a "policy" of discriminatory programming, a policy which the complainant must establish by "substantial extrinsic evidence," the public interest is not violated.

The majority thus affords licensees broad leeway to engage in censorship. Presumably, my fellow Commissioners would have no problems with a licensee who censors only occasional speakers with whose views the licensee does not agree. For sporadic censorship might not constitute the sort of "policy" to which the majority refers.

With this I cannot agree.

Not only does such an approach ignore the First Amendment and afford licensees the power to impose their moral and social opinions upon the viewing public, but this approach, insofar as I am aware, was rejected in an earlier decision by this Commission. See *Letter to Albert H. Kramer*, 25 F.C.C. 2d 705 (1970), where the Commission appeared to concede that even one incident of program discrimination would abridge the public interest.

Now the Commission appears to back away from its earlier, more rational approach. Indeed, the Commission demands that a petitioner prove, by "substantial extrinsic evidence," the existence of the licensee's policy of program discrimination. As I have tried to point out on an earlier occasion, see my dissent in the *Kramer* case, *supra*, at 713, the majority's reliance on the *Hunger in America* case, 20 F.C.C. 2d 143 (1969), for its "substantial extrinsic evidence" rule is misplaced. *Hunger in America* involved the Commission's response to the problem of alleged news-staging, a probem which is very different from broadcast censorship of invited guests.

In any event, the petitioner in this case has, in my judgment, offered substantial extrinsic evidence of KTLA's "policy" of program discrimination. The petitioner has presented an affidavit asserting that KTLA refused to allow Mr. Lane to appear on the "Robert Dornan Show" for fear that he, Mr. Lane, might be too controversial. Petitioner has also submitted a letter from KTLA's files complaining about the station's apparent censorship of a young attorney who attempted to espouse "unconventional" views on the subject of marijuana.

Curiously, the majority finds that Mr. Lane, did, in fact, appear on the Dornan show and that the deletion of the marijuana discussion was the result of a technical failure. But, there has been no hearing on

these questions, and at the very least, the facts must remain in dispute. One wonders how the majority and the staff managed, in so casual a fashion, to resolve these disputed issues in the licensee's favor.

Though I believe that the petitioner has met the majority's purported test by providing substantial evidence of KTLA's continuing pattern of program discrimination, I remain troubled by that "test." One instance of program discrimination should merit our disapprobation, for such censorship cannot possibly serve the public interest. The licensee's censorship of Mr. Lane during the "Virginia Graham Show" constitutes such program discrimination irrespective of the excuse now put before us by KTLA.

The majority admits, as it must in view of the licensee's own concession, that there were no audio difficulties during the Graham show. The station *now* argues that the explanation conveyed to the public was false and that the real reason for deleting Mr. Lane's remarks was the assertion by the station's attorney that Mr. Lane's comments constituted defamation *per se*.

The majority accepts this explanation and also sees no problem with the licensee's misrepresentation to the public. I have substantial difficulty with both conclusions.

First, it is inconceivable to me that the station could have believed, in good faith, that Lane's remarks constituted defamation *per se*. Lane never accused Cole of committing atrocities. Rather, Lane merely reported what Cole had told him during an interview. The only question, then, insofar as defamation was concerned, was whether Cole actually said what Lane was attempting to repeat.[1]

Cole never denied making the statements reported by Lane. Indeed, Cole admitted in his affidavit that he had made similar statements to *People's World* magazine which published his account in December 1969.

Further, the licensee never accepted Mr. Lane's offer to exhibit films of his interview with Cole—films which Lane contends would have established the truth of his report concerning Cole's statements. The station's refusal to view these films illustrates full well the station's unwillingness to determine the facts and, hence, to avoid any possible legal problems raised by the station's attorney.[2]

There is, then, no evidence of KTLA's good faith. Yet, the majority accepts the licensee's excuse without reservation.

Second, the majority blithely accepts the station's assertion that the fraudulent explanation given to the public for the deletion of Mr. Lane's words was unintentional. The majority apparently adopts a presumption that a licensee who misrepresents itself to the public does not do so intentionally. For, the majority asserts, the complainant has

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[1] Under the California statutory and common law, truth is a defense to a charge of defamation. See, *e.g.*, Cal. Civ. Code § 46; *Emde* v. *San Joaquin County Central Labor Council*, 23 Cal. 2d 146, 143 P. 2d 20 (1943); *Jeffers* v. *Screen Extras Guild, Inc.*, 162 Cal. App. 2d 717, 328 P. 2d 1030 (1958).

[2] It is unlikely that KTLA could have been held liable for defamation unless it broadcast Lane's statements in "knowing or reckless" disregard for the truth. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1965); *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971). Had KTLA viewed the films which Mr. Lane claimed would verify the truth of his remarks, KTLA could not have acted in reckless disregard for the truth. At the very least, then, the licensee should have a duty to investigate whenever it censors a guest's comments on the ground that it believes those comments may be defamatory.

Further, the *Rosenbloom* case strongly indicates that even if a broadcast station permits a party to make a false statement over the air, the station will not be subject to damages if it affords the injured party an opportunity to respond. *Rosenbloom*, *supra*, at 17–18 n. 15. In the future, therefore, the Commission should give little credence to a station's claims of possible defamation.

not proved otherwise. I would have thought that the licensee's intent would be presumed, with the burden of proving the contrary on the station.

A licensee has an affirmative duty to deal candidly with the viewing public. If it is going to persist in censoring views with which it disagrees, the station must at least advise the public of its true reasons. This was obviously not done here. The licensee contends that the program director did not order the fraudulent announcement, that he had not ordered any explanation for the deletion.

This is sufficient for the majority. In the future, if the majority is consistent, all a program director bent on censorship need do is deny responsibility for the false representations given by his station to the public. At the very least, I should think that the station's program director must have a duty to be aware of his station's censorship and must, therefore, have an affirmative duty to see to it that the public is properly informed.

All of the foregoing is merely to illustrate my objections to the majority's rationale and to its disregard for the public interest.

Perhaps more fundamental is my disagreement with the majority's underlying assumptions in this highly complex and sensitive area. As I have argued in the past, see my dissent in *Letter to Ottinger*, 18 P & F Radio Reg. 2d 1031 (1970), I believe it is long past time for us to begin a general policy review of the existing judicial precedent, past Commission decisions, and general communications and First Amendment policies affecting cases like this.

The majority notes that the licensee is not a "common carrier" under section 3(h) of the Communications Act and that, as a result, the licensee is not obligated either to afford access to Mark Lane or to refrain from "editing" his opinions. Access is not at issue in this case; the only question is whether the licensee is under any First Amendment constraints when it seeks to censor a person to whom it has already granted access.

The majority's convenient contention that, under section 3(h), the licensee is not a "common carrier" merely begs the question. In my view, the legislative history reveals that the statutory reference to "common carrier" refers only to the regulation of rates charged by stations. But even if the majority's interpretation were correct, and if section 3(h) was intended by Congress as a means of shielding broadcasters from Constitutional imperatives, then the majority should consider whether section 3(h) can be squared with the First Amendment under the *Red Lion* case, *Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367 (1969), and the more recent *Business Executives Move for Vietnam Peace v. F.C.C.*, F. 2d (D.C. Cir. 1971).

The thrust of those cases is that television stations are imbued with at least a partial governmental function, and that they are therefore subject to First Amendment principles. I would think this especially true of governmentally licensed stations when they broadcast "talk shows" which serve as forums for the airing of various forms of public expression. For, in such circumstances, "Conduct that is formally private may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton*, 382 U.S. 296, 299 (1966).

I repeat, the issue before us is not whether Mark Lane has a legally enforceable "right" to force his way onto the stage of the "Virginia Graham Show" and leave such views as he pleases on video tape for national distribution by the show's owners. The issue is whether, having invited Mr. Lane on the show in the first place for the expression of views generally known to the producer, the show (or a station broadcasting it) can selectively censor ideas, facts and opinions from the tape because they do not square with those of the management.

The Commission should consider this increasingly important problem in broadcast regulation. It should attempt to develop an analytic scheme whereby broadcast licensees, like other governmental bodies, might be subject to the doctrine against prior restraints of expression. Such an approach would surely reduce the broadcast industry's censorship of opinions between the time they are taped and the time they are aired.

But the majority has clearly ignored this approach and has declined to deal in any but the most superficial manner with the very real problem of corporate censorship in this country.

Hopefully, the courts will not abide either the majority's reasoning or its result. In any event, I cannot. I dissent.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
CITIZENS FOR STANDARD TIME
Concerning Fairness Doctrine Re Station
WJIM–TV, Lansing, Mich.

OCTOBER 12, 1972.

GERALD CURTIS, ESQ.,
612 Penobscot Building,
Detroit, Mich.

DEAR MR. CURTIS: This is in reference to your letter of compliant, dated September 26, 1972, on behalf of "Citizens for Standard Time" and against Station WJIM–TV, Lansing, Michigan and its licensee, Gross Telecasting, Inc.

In that letter, you state that on August 22, 1972, WJIM–TV presented an editorial advocating daylight saving time for the State of Michigan.[1] You state that the daylight saving vs. standard time question is a controversial issue of public importance and will be the subject of a statewide referendum in the November 7 general election.

You further state that after the broadcast of the editorial in question, Citizens for Standard Time requested "equal time" from WJIM–TV to present its view opposing daylight saving time. By letter dated September 5, the licensee declined to grant that request but noted that WJIM–TV was planning a dialogue program which would air both sides of the issue and that Citizens for Standard Time would be invited to present its position on such program. You state that by letter dated September 11, the group modified its request to ask for "an opportunity to reply to the specific editorial in question." The copy of that letter which you have submitted indicates that the group also accepted the licensee's tentative invitation to present its viewpoint on the proposed program. By letter dated September 22, the licensee again refused the request for time to specifically reply to the editorial; however, a formal invitation was extended to Citizens for Standard Time to send two representatives to present the group's view on a "confrontation program" scheduled for November 2. The letter also noted that the representatives would be given approximately half the program (14 minutes) to present their position and could specifically address and rebut WJIM–TV's editorial during that time.

Your letter requests the Commission to find Station WJIM–TV in violation of the fairness doctrine and to direct the station to afford Citizens for Standard Time a reasonable opportunity for the presentation of views opposed to its editorial of August 22. In particular, you point to the licensee's failure to broadcast any view opposed to the position taken by its editorial during the period from August 22 to the present time and assert that such delay "denies the public the

[1] The licensee's attorney has advised the Commission that the editorial was broadcast twice on August 22 (during the 6 p.m. and 11 p.m. news).

right to be fully informed as to both sides of this important daylight saving time issue" and "emasculates the effectiveness of . . . opposition." You also contend that the licensee's offer to permit Citizens for Standard Time to present its views during the scheduled program and to then respond to the station's editorial fails to constitute compliance with the fairness doctrine.

The Commission has held that it is within the discretion of the licensee to determine how best to present contrasting views with respect to matters of spokeman selection and program scheduling and format and that the Commission's review of such decisions will be confined to the question of whether the licensee, in its overall performance, has acted reasonably and in good faith. See *Letter to the Honorable Oren Harris*, 40 FCC 2d 582 (1963).

Applying these principles to your complaint, it is noted that Citizens for Standard Time has accepted the licensee's offer to appear and present its view on the program scheduled for November 2 and will be permitted specifically to reply to the editorial at that time. Upon these facts, it would appear that the station has fully complied with its fairness doctrine obligation to afford a reasonable opportunity for the presentation of contrasting views on the issue of daylight saving vs. standard time. It is believed that in light of its immediacy to the November 7 referendum, the scheduled program will provide an effective opportunity for the presentation of views opposed to daylight saving time, and therefore it cannot be concluded that the licensee is in violation of the fairness doctrine in its handling of the daylight saving vs. standard time issue.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

F.C.C. 72–856

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
GEORGE D. COREY, NASHUA, N.H.
Concerning Fairness Doctrine Re Stations WBZ–TV, WNAC–TV, and WSBK–TV, Boston, Mass.

SEPTEMBER 27, 1972.

MR. GEORGE D. COREY,
18 Raymond Street,
Nashua, N.H.

DEAR MR. COREY: This is in reference to your letter dated March 27, 1972, concerning three Boston television stations, namely, WBZ–TV, WNAC–TV and WSBK–TV.

In your letter you state that these stations have continued to carry programming directed at children which contains an inappropriate amount of violence. You also state that such operation is not in the public interest in that there is a casual relationship between the viewing of televised violence and children's anti-social behavior.

Therefore, you request the Commission to take one of several alternative courses of action. First, you request the Commission to conduct a complete investigation into the extent of children's programs containing violence on these stations and, once having ascertained the results of such a study, to require the stations to either (1) eliminate such programming, (2) substantially reduce such programming, or (3) broadcast such programming only after 9:00 p.m. as is done in Great Britain.

Alternatively, you request the Commission to either withhold renewing the licenses for these stations or grant them only probationary licenses until the Commission decides what action it will take in regard to the broadcasting of violence in children's programs. Finally, you request the Commission to require the licensees of WBZ–TV, WNAC–TV and WSBK–TV to comply with the fairness doctrine by broadcasting the following public service notice or its equivalent: *Warning:* Viewing of violent television programming by children can be hazardous to their mental health and well being.

In support of this aspect of your request you cite several studies, including the Report of the Surgeon General's Scientific Advisory Committee on Television Violence and Social Behavior entitled, *Television and Growing Up: The Impact of Televised Violence.* As noted in your letter, the Surgeon General's Report indicates that violence on children's programming *may* have a detrimental effect on their behavior. You also cite a study conducted by Professor F. Earle Barcus,

109–013—72——3

Professor of Communications Research at Boston University. You state that this study revealed the number of dramatic episodes containing some violence on the Saturday morning children's programming as shown on the stations made the subject of your letter.

In conclusion, you state that "* * * by merely showing violence via their children's programming, they [WBZ–TV, WNAC–TV and WSBK–TV] have unfairly presented violence as something worthwhile for young children to watch without indicating that exposure to such stimuli may be detrimental to this class of the public—namely, children." You also state that you "* * * can see no rational distinction which requires that the Fairness Doctrine apply to the Banzhaf case and not to * * *" yours.

The Commission presently has outstanding a *Notice of Inquiry* and *Notice of Proposed Rule Making* in Docket No. 19142 (FCC 71–71) regarding several matters pertaining to children's programming. Also, there is presently pending before the Commission a petition for rule making filed by the Foundation to Improve Television (RM–1515). This petition seeks to prevent the presentation before 11:00 p.m. of violent or horror programs on television.

The issues raised in your letter regarding violence in television programming, particularly as it relates to children's programming, apply to the television industry as a whole. As such, we do not believe that it would be appropriate at this time to make an *ad hoc* determination whether the presentation of such programming by one, two or three, licensees may have a detrimental effect on children. Instead, we believe that it is more appropriate to consider such industry wide problems through the Commission's rule making forum. See, for example, Hale v. F.C.C., 425 F. 2d 556 (1970).

Concerning the fairness aspects of your letter, as you are aware the fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of contrasting viewpoints on the issue in its overall programming. As we interpret your letter, you maintain that the controversial issue is the effect of violence in children's television programming and, thus, that stations which broadcast children's programming containing violent episodes are presenting one side of the issue and must afford reasonable opportunity for the presentation of contrasting viewpoints on that issue. As previously indicated, you compare this situation with the cigarette situation.

Although you list the names of several programs which allegedly contain violent episodes, you fail to provide any specific evidence (e.g., tapes or transcripts) concerning these programs which could lead to a conclusion that one side of a controversial issue has been presented. As we stated with regard to similar vague allegations in our letter of November 25, 1969, to *Allen C. Phelps and the Federation of Citizens Associations of the District of Columbia*, 21 FCC 2d 12, where it was charged that the licensee had presented only the "liberal" viewpoint on a number of issues such as racial discrimination:

> Absent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees

specifically to disprove allegations such as those made here. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries and discussion of public issues, many of which are treated over long periods of time. Accordingly, although the Commission intends also to employ other appropriate procedures to insure compliance by licensees with the fairness doctrine (e.g., in-depth spot checks at renewal time), it has long been our policy normally to require that fairness doctrine complaints (a) specify the particular broadcasts in which the controversial issue was presented, (b) state the position advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensees in his overall programming has not attempted to present opposing views on the issue. See *Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964).

In sum, as a public trustee, the licensee must shoulder certain burdens, including upon appropriate complaint the burden of showing that he has complied with the fairness doctrine. However, based on our experience, we find that the public interest also requires some reasonable specificity in a complaint to trigger a detailed showing by the licensee that he has complied with the fairness doctrine on a particular controversial issue of public importance. There is no such specificity contained in your letter, just as there was none in the *Phelps* case, supra.

We also believe the questions raised concerning violent episodes in children's programming are distinguishable from our holding in the cigarette advertising matter.

The Commission's ruling in the Banzhaf case, *In the Matter of Television Station WCBS*, 8 FCC 2d 381 (1967), *recons. denied*, 9 FCC 2d 921, *affirmed sub. nom. Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (C.A.D.C. 1968), *cert. denied*, 396 U.S. 842 (1969), held that the fairness doctrine is applicable to cigarette advertising. The Commission took note of the 1964 *Report of the Advisory Committee to the Surgeon General of the Public Health Service* and other studies which found a link between smoking and various diseases. In that case the Commission was presented with evidence that cigarette advertisements promoted smoking as attractive and enjoyable. The Commission concluded, therefore, that "* * * a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that, however, enjoyable, such smoking may be a hazard to the smoker's health."

However, it could not reasonably or logically be concluded that the mere viewing of a person smoking a cigarette during a movie being broadcast on television constitutes a discussion of a controversial issue of public importance thus raising a fairness doctrine obligation. Similarly, we cannot agree that the broadcast of violent episodes during entertainment programs necessarily constitutes the presentation of one side of a controversial issue of public importance. It is simply not an appropriate application of the fairness doctrine to say that an entertainment program—whether it be Shakespeare or an action-adventure show—raises a controversial issue if it contains a violent scene and has a significant audience of children. Were we to adopt your construction that the depiction of a violent scene is a discussion of one

side of a controversial issue of public importance, the number of controversial issues presented on entertainment shows would be virtually endless (e.g., a scene with a high-powered car; or one showing a person taking an alcoholic drink or cigarette; depicting women in a soft feminine or light romantic role). Finally, we note that there are marked differences in the conclusiveness of the hazard established in this area as against cigarette smoking. See the *Surgeon General's Report on the Impact of Televised Violence*, pp. 11–12.

The real thrust of your complaint would appear to be not fairness in the discussion of controversial issues but the elimination of violent TV children's programming because of its effect on children. That issue is being considered particularly by appropriate Congressional committees and agencies such as HEW. See above Report. It is a difficult, complex, and sensitive matter. But whatever its resolution, there is no basis for the action along the lines proposed by you.

In view of the above, no further action is warranted by the Commission at this time and, accordingly, your request for relief is DENIED.

Commissioner Johnson dissenting and issuing a statement.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Opinion of Commissioner Nicholas Johnson

The Commission today gives incredibly short shrift to one of children's television's most pressing problems: violence.

George D. Corey, a student at Suffolk Law School, brought this complaint against three Boston television stations—WBZ, WNAC and WSBK—charging that the children's programming carried by these stations contains inordinate amounts of violence. Mr. Corey asks that, pending an investigation of these programs, we grant the stations only probationary license renewals, and that we require the stations to comply with the fairness doctrine by agreeing to present announcements warning of the dangers of violence in children's television.

The majority advises Mr. Corey that the Commission is currently studying several matters pertaining to children's programming in its outstanding *Notice of Proposed Rulemaking*, Docket No. 19142. So the majority simply dismisses Mr. Corey's complaint. Surely this is a Draconian method of dealing with a charge which raises problems the seriousness of which the Commission has itself acknowledged by holding its present hearings. I would have thought that in these circumstances we would at least *defer* our ruling on the Corey complaint, and grant probationary renewals to the stations until after the completion of our nationwide inquiry into children's television.

Perhaps more serious, however, is the majority's cursory treatment of Mr. Corey's fairness doctrine contention. Mr. Corey asserts that violence on children's television raises a controversial issue of public importance and that the stations presenting such programming must afford a reasonable opportunity for the presentation of contrasting viewpoints.

The majority rejects this claim for two reasons.

First, it notes that Mr. Corey has not presented the requisite "detailed and specific" evidence of the stations' failure to comply with the fairness doctrine. If, by this, the majority means that the complainant has not come forth with specific examples of violent programming on children's television, the Commission should so advise Mr. Corey and should give him an opportunity to amend his complaint. Simply to dismiss that complaint is to penalize a concerned citizen for his unfamiliarity with the complexities of our pleading rules—an approach even the courts have rejected in their dealings with attorneys schooled in the intricacies of the law. Such an approach cannot possibly serve the public interest. (See my concurring and dissenting opinion in In re Application of the Meredith Corporation [WOW], —— FCC 2d ——, —— decided this day.)

The majority also suggests that violence on children's television is not, for fairness doctrine purposes, analogous to cigarette advertising. In the Banzhaf case, *In the Matter of Television Station WCBS*, 8 F.C.C. 2d 381 (1967), recons., den., 9 FCC 2d 921, aff'd sub. nom., *Banzhaf v FCC*, 405 F. 2d 1082 (D.C. Cir. 1968), cert. den., 396 U.S. 842 (1969), we noted that cigarette advertisements promote the use of products which, according to findings by the Surgeon General, may be hazardous to the users' health. We therefore held that such advertisements presented one side of a controversial issue of public importance, thus warranting presentation of the other side under the fairness doctrine.

The majority attempts, rather disingenuously, to distinguish *Banzhaf* on the grounds 1) that the Surgeon General has not found a close link between violence on children's television and a child's anti-social behavior and 2) that broadcasting violence does not promote such violence in the same way that a cigarette advertisement promotes smoking.

Yet the majority itself notes that the Surgeon General has determined that "televised violence may lead to increased aggressive behavior in certain sub groups of children." *Television and Growing Up: Report on the Impact of Televised Violence* (1971) at 7. And that report goes on to reveal the more general conclusion that "a modest relationship exists between the viewing of violence and aggressive behavior." *Id.* at 9. The multi-volume staff backup uses much stronger language. In any event, the existence of this casual link is surely close enough to warrant considerable concern.

Further, the fact that violence on children's television is not promoted through advertising, but simply exists as a substantial component of children's television fare, is not only irrelevant but actually cuts the other way. Not only would it be rather bizarre if advertisers attempted to promote the "goodness" of violence in the same manner they promote cigarettes, but, to the child, the fact of continuous violent programming is, in itself, a promotion of the idea. What made *Banzhaf* a break through was the application of the fairness doctrine to advertising in such a forceful manner. Thus, the absence of advertising in this case makes it a stronger one than *Banzhaf*, not weaker.

To assert that violence on children's television does not raise a controversial issue of public importance is, then, to close one's eyes to a very real problem. Indeed, by refusing to require that licensees at least warn parents of the potential dangers inherent in current children's programming, the majority has, in my judgment, left our licensees wide open to possible tort liability. For, if the television set manufacturer is legally liable for the physical damage done by radiation from the set, why should the network be free of responsibility for the psychic harm done by what *it* radiates from the set? (See *How To Talk Back To Your Television Set* 172 (Bantam, 1970)).

One of the reasons the cigarette manufacturers *wanted* the warning ("Caution: Cigarette smoking may be hazardous to your health") printed on the cigarette packs is that, without such a warning to the user, they were taking a substantial risk of hundreds of millions of dollars of tort liability to the survivors of the 300,000 people they helped kill every year. Now that the evidence of the relation of violent programming to violent behavior (and other psychic harm to children) is so clear, it is only a matter of time before the networks' tort liability will also begin to grow. One would think that they would *want* such warnings broadcast to avoid it. The FCC, in its eagerness to serve the industry's profits, may actually be handing it a loss from which it will be a long time in recovering.

While recourse to the courts is certainly one means of dealing with this problem, and whatever the industry's best interest may be, this Commission also has a responsibility to the public as well as the broadcasters, a responsibility which it completely ignores by today's decision. The majority has, once again, passed the buck to the courts. I dissent.

F.C.C. 72-855

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In Re Complaint by
MRS. FRAN LEE, DIRECTOR, CHILDREN BEFORE DOGS
Concerning Fairness Doctrine Re Stations WNBC–TV–AM–FM, New York, N.Y.

SEPTEMBER 27, 1972.

MRS. FRAN LEE,
Director, Children Before Dogs,
Empire State Building—Room 5216
New York, N.Y.

DEAR MRS. LEE: This is in reference to your letter of May 19, 1972, wherein you challenge the license renewal applications for Stations WNBC–AM–FM–TV, New York, New York, all of which are licensed to the National Broadcasting Company, Inc. (NBC).

You state, as a basis for your challenge, that NBC has violated the fairness doctrine by presenting only one side of a controversial issue of public importance. In sum, you state that NBC has carried numerous appearances of dogs and other animals in entertainment programs and 125 commercials a day concerning pet food and pet products. You also state that, through such programming and advertisements, NBC has misled the public into thinking that dogs are man's best friend when, in fact, dogs and other animals carry many diseases harmful to man. In this respect, you state that NBC has failed to broadcast information concerning these diseases and that this situation "* * * is similar to the cigarette story. * * *"

By letters dated February 13, 1972, and March 19, 1972, you raised similar questions and alleged that NBC had violated the fairness doctrine. After reviewing this previous correspondence, the Acting Chief, Complaints and Compliance Division, advised you by letter dated April 25, 1972, as follows:

> **In regard to the issue of the effect of dogs and other pets on the health of humans, it appears that under present Commission interpretation of the fairness doctrine, dog food advertisements, discussion of more humane treatment for these animals, or entertainment programs involving such animals do not raise a controversial issue of public importance. However, the Commission is currently reviewing the fairness doctrine and the issue of whether commercial advertisements can implicitly raise a controversial issue of public importance is one aspect of that review.**

We have reviewed all the correspondence in this matter and, based on this review, conclude that the April 25 decision of the Acting Chief,

Complaints and Compliance Division was proper. We also conclude that the Commission's cigarette advertising ruling, 9 FCC 2d 921 (1967), is not applicable to the matter made the subject of your letter.

The fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of significant contrasting viewpoints on the issue in its overall programming. You have not submitted in your correspondence any information to substantiate your claim that the subject matter of your letters is a controversial issue of public importance in the New York area. Clearly, the mere appearance of dogs and other animals on television programs does not in and of itself establish the presentation of a controversial issue of public importance.

Furthermore, as you were previously advised, the Commission is currently reviewing the fairness doctrine and the issue of whether commercial advertisements can implicitly raise a controversial issue of public importance is one aspect of that review. Nonetheless, based on the information you have submitted, we are unable to conclude that the mere advertising of dog food or pet products, by themselves, raise a controversial issue of public importance when viewed in light of the Commission's cigarette advertising ruling. In our cigarette advertising ruling, we noted that there were significant studies which linked cigarette smoking to human illnesses and, therefore, concluded that commercials which advocated the use of cigarettes raised a controversial issue concerning the effects of cigarettes on human health. In the present case, however, you have failed to demonstrate that dog food poses a threat to human health.

In view of the foregoing, your request for relief is DENIED.

Commissioner Johnson dissented.

By Direction of the Commission,
Ben F. Waple, *Secretary*.

F.C.C. 72R-272

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of KEY BROADCASTING CORP., LEXINGTON PARK, MD.	Docket No. 19410 File No. BPH-6540
SOUND MEDIA, INC., LEONARDTOWN, MD. For Construction Permits	Docket No. 19411 File No. BPH-6886

MEMORANDUM OPINION AND ORDER

(Adopted September 27, 1972; Released September 29, 1972)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Key Broadcasting Corporation (Key) and Sound Media, Inc. (Sound) for a new Class A FM facility at Lexington Park and Leonardtown, Maryland, respectively. By Order, FCC 72-78, 37 FR 2804, published February 5, 1972, the Commission designated this proceeding for hearing on various issues, incluuding a Section 307(b) issue and a contingent comparative issue. Presently before the Review Board for consideration is a petition to enlarge issues, filed February 22, 1972, by Sound, seeking the addition of misrepresentation and non-disclosure issues.[1]

MISREPRESENTATION ISSUES

2. Initially, Sound asserts that Key has engaged in several misleading practices relating to the operations of its broadcast facilities and that these matters should be explored at the hearing.[2] Specifically, Sound contends that Key has falsely represented to the public that it operates a FM station in Lexington Park and, in support thereof, petitioner submits photographs of a trailer bearing a three-lined sign reading "WPTX • AM-FM • Lexington Park, Maryland". According to the affidavit of the photographer, the pictures were taken in December of 1971, at a shopping center in Lexington Park. Petitioner also alleges that Key misrepresents to the public and advertisers that its FM station is located in Baltimore, rather than Catonsville, Maryland, the community of license. Submitted in support of this allegation is a sample of the licensee's stationery. The stationery depicts, as

[1] Other related pleadings before the Board are: (a) opposition, filed March 3, 1972, by Key; (b) erratum, filed March 10, 1972, by Key; (c) comments, filed March 15, 1972, by the Broadcast Bureau; and (d) reply, filed March 20, 1972, by Sound.

[2] Key is the corporate licensee of standard broadcast Station WPTX in Lexington Park, as well as Stations WBMD (AM) in Baltimore and WBMD-FM (now WKTK-FM) in Catonsville, Maryland.

part of the heading, an eagle followed on the right by the call letters WBMD. Above the call letters is the word "Baltimore" with "AM–75, FM–105 • 24 hours a day" appearing below the call sign. Beneath the stations' frequency is the following description, "Key Broadcasting Corp. • 5200 Moravia Road • Baltimore, Md.".

3. In its opposition, Key alleges that following a modification of Station WPTX's authorized facilities, the trailer was purchased in January of 1969 with a view toward its use as an auxiliary studio in Waldorf, Maryland; that inscriptions promoting the station's new AM facilities were printed on both sides of the trailer; and that, in order to minimize costs, the FM designation was also included in this sign.[3] Since Station WPTX's new AM and FM facilities were yet to be constructed, a "disclaimer sign", bearing the words "Coming Soon", was also obtained and placed atop the trailer, which was reportedly used at a Waldorf shopping center for a three-month period in early 1969. According to Key, after it was decided not to establish an auxiliary studio in Waldorf, the trailer was moved to Lexington Park and placed in storage, where it has remained except for a three-week period in December of 1971 when the trailer was used as a studio by a photographer to take pictures of children and Santa Claus at a Lexington Park shopping center. Key further contends that the photographer was directed to cover with his own promotional sign the WPTX AM–FM sign that was visible to the public;[4] that to prevent its theft, the photographer removed his sign when he was not at the trailer; and that as a result of the photographer's unanticipated action, the WPTX AM–FM sign was exposed to public view at certain times during the period in question. Arguing that petitioner has misread its stationery, Key points out that the letterhead in question does not state that Station WBMD–FM is located in Baltimore. Key also explains that the Baltimore address set forth in the letterhead is simply intended to indicate that the main studios and business offices of both stations are located in that community. In Key's view, correspondence addressed to Station WBMD–FM, Catonsville, Maryland, "probably would not even arrive at the station".[5]

4. The Broadcast Bureau, in its comments, agrees with petitioner that the stationery in question raises an inference that Key is attempting to mislead the public and advertisers concerning the location of Station WBMD–FM.[6] This inference is further strengthened, in the Bureau's opinion, by an excerpt from *Standard Rate and Data Service* (SRDS), which Key submitted to the Commission on September 23, 1971, in lieu of a rate card, for its FM facility. The trade pub-

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[3] At that time, Key's application was unopposed and remained so until September 29, 1969, at which date the Sound application was filed with the Commission.

[4] Allegedly, the reverse side of the trailer was opposite a brick wall and Key did not consider it necessary to cover the other WPTX inscription.

[5] Key also submits that petitioner has engaged in misleading advertising practices in its operation of standard broadcast Station WKIK, Leonardtown, Maryland. This accusation of misconduct, however, is improperly raised in a responsive pleading, does not form the basis for a requested issue, and is adequately rebutted by the material and affidavits submitted with Sound's reply pleading. Accordingly, based on the information presently before the Board, further consideration of this matter does not appear appropriate.

[6] The Bureau also maintains that the Board would be justified in adding an appropriate issue concerning Key's use of the WPTX AM–FM sign.

lication incorrectly identifies Station WBMD–FM as a Baltimore station with the same Baltimore mailing address that Key used in its stationery. See paragraph 2, *supra*. Since SRDS continues to list Station WKTK–FM (formerly WBMD–FM) as a Baltimore station and since Key now uses stationery for Station WKTK–FM, which sets forth the aforenoted Baltimore mailing address and again fails to mention that the facility is licensed to Catonsville, the Broadcast Bureau submits that the requested issue is especially appropriate.[7]

5. In its reply, Sound posits that the only reasonable interpretation of the Station WBMD–FM letterhead is that Key's FM facility is located in Baltimore. In the same vein, petitioner argues that the "Coming Soon" sign, which Key used at the Waldorf shopping center, was not sufficiently related to the FM designation to alter the false impression that Station WPTX also had an FM outlet. Sound also submits a March 14, 1972 affidavit of its vice president, who avers that on at least five separate occasions he personally saw the WPTX AM–FM sign fully exposed during the day at the Lexington Park shopping center.[8] Finally, petitioner contends that the trailer was not out of public view when it was not being used and, in support thereof, Sound submits an August 1, 1971 photograph showing the trailer stored outside the Station WPTX studio with the sign in question uncovered.

6. The Review Board believes that the requested issue relating to Key's use of the WPTX AM–FM sign should be denied. That Key acted presumptuously when it obtained the WPTX AM–FM sign is without question; however, affirmative steps were taken by the applicant to forestall an impression that it was the licensee of a FM facility in Lexington Park, Maryland. That other, perhaps more effective steps, could have been taken does not detract from the reasonableness of Key's actions. We have no reason to question (and none is proffered by petitioner) the sworn representations of Key that it instructed the photographer to cover the WPTX AM–FM sign and that the photographer's failure to adhere to this directive was unanticipated by the applicant. The fact that Key apparently neglected to cover the sign in question when the trailer was in storage does not persuade the Review Board, under the circumstances of this case, that an issue concerning the matter is warranted. We do believe, however, that a substantial question has been raised with respect to whether Key has attempted to mislead the public and advertisers as to the location of Station WBMD–FM (now WKTK–FM), and the inclusion of an issue in this regard appears appropriate. As the Commission has stated: "[F]ull disclosure, as to both coverage and location, is essential in conforming to the standard of candor required by licensees". *Universal Communications of Pittsburgh, Inc.*, 21 FCC 2d 542, 18 RR 2d 491 (1970). Key's use of stationery with a letterhead, which contains no reference, direct or otherwise, to WBMD–FM's specified station loca-

[7] Copies of a March 1, 1972 excerpt from SRDS and a March 2, 1972 correspondence from the applicant are attached to the Bureau's pleading.

[8] Based upon other information that he believed to be true, the affiant also states that the WPTX AM–FM sign was uncovered "at all times regardless of whether Santa Claus was in the trailer or not".

tion and which lists a mailing address in a community other than the station's community of license, does not appear to comport with the Commission's standard of full disclosure. See *Century Broadcasting Corp.*, 30 FCC 2d 733, 22 RR 2d 221 (1971); and *Gulf Television Co. (KGUL-TV)*, 20 FCC 734, 775–76, 12 RR 447, 473 (1956). And Key has not attempted to substantiate its contention that the use of a Baltimore mailing address in Station WBMD–FM's stationery is necessary to ensure mail delivery. Based upon the materials submitted by the Broadcast Bureau, a serious question is also raised, in the Board's view, concerning Key's responsibility for SRDS's identification of the Station as a Baltimore, rather than a Catonsville facility.[9] The Review Board will, therefore, add an appropriate issue to permit the full exploration of these matters at the hearing.

NONDISCLOSURE ISSUE

7. The Key application, which was filed on November 22, 1968, does not contain a completed Section II of FCC Form 301. Rather, the applicant refers the Commission to the "station file [for] WBMD, Baltimore, Maryland" and directs the Commission's attention to the ownership reports (FCC Form 323), submitted with respect to Stations WBMD, WBMD–FM, and WPTX, for "the most recent data on ownership and additional broadcast interests". As part of its application, Key also submits excerpts from the March 22, 1968 and June 20, 1966 ownership reports of Station WBMD–FM and Station WBMD, respectively. In support of the requested non-disclosure issue, Sound maintains that the Key application does not reflect the ownership interest (6.8%) of D. Ridgely Bolgiano, a Key principal, in Drexel Hill Associates, Inc. (Drexel Hill), the licensee of Stations WMTR and WDHA–FM, Morristown and Dover, New Jersey, respectively. Since various ownership reports filed with the Commission by Drexel Hill and by Key conflict with respect to Bolgiano's interest in Key, petitioner suggests that the applicant may also have been remiss in apprising the Commission of changes affecting its ownership as required by Rule 1.615.

8. Key opposes the request, contending that its ownership reports clearly and accurately set forth D. Ridgely Bolgiano's 0.6% ownership interest, as well as his co-trusteeship of various trusts, which hold in the aggregate, an additional 16.2% interest in the corporate applicant.[10] Key further alleges that Bolgiano's association with Drexel Hill was reported in the June, 1966 ownership report and the June, 1969 renewal applications which Key submitted on behalf of its stations. It is conceded, however, that fluctuations in Bolgiano's interest in Drexel Hill and that corporate licensee's acquisition of Station WMTR were

[9] It is not specifically alleged that the licensee supplied the incorrect information used in the trade publication; however, we cannot conclude that Key was unaware of the erroneous station location listing in view of the licensee's use of the SRDS material. See paragraph 4, *supra*.

[10] Bolgiano is also a director of Key, whose participation in the applicant's affairs is reportedly limited to attending the directors' bi-monthly meetings.

not disclosed in the station files to which Key referred in its application.[11] While "something in passing" was said by Bolgiano concerning the acquisition of Station WMTR, the officers of Key were allegedly unaware of their obligation to amend Key's reports to reveal the November, 1970 assignment of that station. Assertedly, affirmative steps have been taken by counsel to keep future reports of Drexel Hill and the applicant accurately cross-referenced.

9. The instructions, which accompany FCC Form 301, state at paragraph E that: "[I]nformation called for by this application which is already on file with the Commission . . . need not be refiled in this application" provided, *inter alia*, that specific reference is made to the document containing the relevant information. While Key's reference to the ownership reports submitted on behalf of its stations did not fully comport with the required specificity, the June, 1966 reports filed for Stations WBMD and WPTX do provide a specific and adequate description of D. Ridgely Bolgiano's ownership interest in Station WDHA–FM. Compare *Bangor Broadcasting Corp.*, 33 FCC 2d 677, 23 RR 2d 711 (1972). Admittedly, fluctuations in Bolgiano's interest in Drexel Hill were not reflected in the Key application; however, no inquiry appears warranted since it has not been shown that these changes were substantial and, therefore, reportable under Rule 1.65.[12] See *Lawrence County Broadcasting Corp.*, 15 FCC 2d 910, 15 RR 2d 482 (1969). On the other hand, Key's failure to amend its application to reflect the acquisition of Station WMTR by Drexel Hill clearly contravened the provisions of Rule 1.65. See *James E. Reese*, FCC 72–423, 37 FR 10610, published May 25, 1972; *Bangor Broadcasting Corp., supra.* Notwithstanding the applicant's claim that the omission was inadvertent and unintentional, Key had, in initially amending its ownership reports to reflect Bolgiano's relationship with Station WDHA–FM, demonstrated an awareness of its responsibilities in this regard. In any event, the question of intent may be explored under the Rule 1.65 issue being specified herein.[13]

10. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed February 22, 1972, by Sound Media, Inc., IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

11. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issues:

> To determine whether Key Broadcasting Corporation has, in its stationery and in a trade publication, misrepresented to the public and advertisers the station location of Station WBMD–FM

[11] In its supplemental pleading, Key submits a February 28, 1972 amendment to the Commission's ownership files, describing Bolgiano's relationship with Drexel Hill (director, secretary and 6.8% stockholder) and identifying the broadcast interests of that licensee.

[12] In the same vein, the Board finds that petitioner's charge of a possible Rule 1.615 violation is largely speculative and sufficiently answered in Key's responsive pleading.

[13] Although Key has amended its ownership reports on file with the Commission, the Board notes, in passing, that the requirements of Rule 1.65 are not satisfied by such notification. Rather, as we pointed out in *Folkways Broadcasting Co., Inc.*, 26 FCC 2d 175, 178, 20 RR 2d 528, 532 (1970): "[A]ny subsequent changes of a substantial and significant nature *must* be reported by amending the pending application or by furnishing a statement for the record containing the appropriate information".

(now Station WKTK–FM) and, if so, the effect thereof upon the basic and/or comparative qualifications of the applicant.

To determine whether Key Broadcasting Corporation has failed to comply with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission advised of substantial changes in the matter specifically referred to in this Memorandum Opinion and Order and, if not, to determine the effect of such noncompliance on the basic and/or comparative qualifications of the applicant.

12. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the issues added herein SHALL BE on Sound Media, Inc., whereas the burden of proof thereunder SHALL BE on Key Broadcasting Corporation.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-938

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LEFLORE BROADCASTING CO., INC., LICENSEE OF STATION WSWG(AM), GREENWOOD, MISS.
Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

(Adopted October 18, 1972; Released October 20, 1972)

BY THE COMMISSION

1. In *Leflore Broadcasting Company, Inc.*, 36 FCC 2d 101, released July 25, 1972, among other things, we refused to issue a cease and desist order or institute a revocation proceeding against Leflore Broadcasting Company, Inc. (Leflore), licensee of Station WSWG, Greenwood, Mississippi. We did, however, call for the early filing (November 1, 1972) of the renewal application of Station WSWG. These actions were taken in response to a petition filed by various individuals and an organization residing or located in the Greenwood area.[1] Now under consideration are a motion for clarification or reconsideration filed August 28, 1972, by the same petitioners, and related pleadings.[2]

2. Leflore raises various procedural objections to the consideration of the matters raised in the petitioners' pleadings. Rather than discuss those procedural questions, we state only that we believe that the public interest would be served by considering the petitioners' motion, and we shall do so on our own motion.

3. The petitioners, having previously submitted substantial pleadings prior to our first decision in this matter, are concerned that they may be required to resubmit those pleadings when the WSWG renewal application is filed. However, in the ordering clauses of the first decision, we did not dispose of all matters raised in their pleadings, and those matters are still before us. Specifically, we left open three questions that were raised by the various pleadings. The petitioners need not plead their case a second time as to those questions. On the other hand, we did indicate that based on the information then before us, we would not raise a question as to the change in WSWG's format, and that whatever action might ultimately be taken, reinstatement of former employees with back pay would not be ordered. The petitioners may, if they wish, submit a pleading on those points, or upon any matter they believe is raised by the WSWG renewal application.

[1] The petitioners are Johnny W. Williams, Theodore Hill, Jr., George Davis, W. S. Lee, Jr., Martha Cooley, Jake McGhee and The Greenwood Movement, a civil rights organization.

[2] The related pleadings are: an opposition to the motion filed September 11, 1972, by Leflore; and a reply filed September 27, 1972, by the petitioners.

However, to aid in the orderly disposition of the renewal application, the deadline for filing such a pleading is the 60th day after public notice is issued of the acceptance of the application. The petitioners may, of course, file their pleading before the expiration of the 60-day period.

4. In our first decision, we found that substantial and material questions of fact were raised concerning Leflore's operation of Station WSWG, based on the information before us. Accordingly, we stated that a hearing may be required on Leflore's renewal application, when filed. The petitioners request that we now state that a hearing will automatically be ordered. Such a determination would prejudge any material that may be contained in or submitted with the renewal application, and therefore, we believe it inappropriate to make such a determination now.

5. The petitioners also state that "a hearing" (type not indicated) should be designated now. We believe that it would be more appropriate to consider possible designation of a hearing in connection with an application for renewal of license, which is why we have called for an early filing of the renewal application here. Although calling for filing of an early renewal application has occasioned a slight delay in our further consideration of the case, the application must be filed by November 1, 1972—an early date when it is considered that renewal applications normally require a considerable amount of time to prepare, including ascertainment of community needs and problems.

6. Accordingly, IT IS ORDERED, That the petitioners' motion for clarification or reconsideration IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-899

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE NATIONAL BROADCASTING CO., ASSIGNOR and OHIO COMMUNICATIONS, INC., ASSIGNEE For Assignment of License of Stations WKYC-AM and FM, Cleveland, Ohio	BAL-7553 and BALH-1656

OCTOBER 5, 1972.

MR. KENNETH A. BICHL,
c/o American Federation of Television and Radio Artists,
1276 West 3rd Street,
Cleveland, Ohio

DEAR MR. BICHL: This is with reference to your letters of June 5, 1972 and August 1, 1972 objecting to the assignment of the licenses of Stations WKYC-AM&FM, Cleveland, Ohio from The National Broadcasting Company (NBC) to Ohio Communications, Inc. (Ohio) (BAL-7553; BALH-1656).

In your June 5, 1972 letter, the following points in support of the objection were made:

1. Ohio proposes a decrease in news programming from 12% to 8%; a decrease in public affairs programming from 8.7% to 4.0%; and a decrease in "all other" programming from 3.9% to 3.5%.

2. Ohio proposes to broadcast 25% less local news than NBC is currently broadcasting.

3. Ohio cannot render the same outstanding news service to the public that NBC has been rendering in view of its proposed reduction in news staff. You contend the public is entitled to this outstanding news service from the area's most powerful radio station (50 kw Clear Channel).

4. The financing arrangement proposed by Ohio, whereby 50% of the station's net revenue would be paid to lending banks gives these lending banks an illegal degree of control over the licensee.

5. The principals of Ohio are also the principals in firms which own the professional athletic teams in Cleveland. The assignment application indicates that Ohio hopes to broadcast the games of these teams and make reference to this association in station identification announcements, i.e., voice of the [team]. You contend this reduces the station to a "federally licensed promotional tool of the owners".

In your letter of August 1, 1972, you reiterated the above points and made the following additional points:

1. Ohio intends to broadcast portions of its public affairs programming on Sunday. You contend that public affairs programming should be broadcast at some other time.

109-013—72——4

2. You note that in an amendment by Ohio concerning additional financing, the bank must approve the person to be chief executive of Ohio if it is to be anyone other than the present person—Mr. Nick Mileti.

3. The separation of WKYC–AM&FM from WKYC–TV does not, as assignee claims, advance important Commission policies.

The Commission has reviewed the WKYC–AM&FM assignment applications, amendments thereto and responses by the applicants to your objections and finds that the proposed assignment is in the public interest. While it is true, that there will be a reduction in overall news broadcasting from 12% to 8%, we do not believe that this raises a substantial question of fact which would require a hearing. This is particularly so in this case, where the present licensee (NBC) is able to maintain a large combined staff for AM/FM/TV and other network purposes, while on the other hand the assignee is proposing an independent AM/FM operation. Regarding "Public Affairs" and "All Other" non-entertainment programming, we find that the assignee's proposal is substantially the same as that actually broadcast by NBC. (On an adjusted bases, NBC broadcasts 4.5% Public Affairs and 3.9% "All Others" while the assignee proposes 4.0% and 3.5% respectively.) The fact that WKYC is a 50 kw Clear Channel station does not affect these considerations. As for Ohio's proposal to broadcast public affairs programs on Sundays, such decisions are left to the discretion of the licensee and not altered by the Commission unless a substantial showing has been made that broadcasting these programs on Sunday is contrary to the public interest. Bare allegations, such as yours, are insufficient and do not constitute the substantial showing necessary to require a hearing on this matter.

The financial arrangement, which no longer provides for bank approval of the chief executive, provides for a fixed repayment schedule by Ohio of a specific sum however, if station *net earnings* should reach a specified minimum, then 50% of the net earnings would be paid to the bank and applied against the fixed amount due the bank. The Commission finds no reason to conclude that this arrangement creates the risk of potential influence or control by the bank over Ohio. With regard to the ownership of Cleveland athletic teams by Ohio principals, Ohio states that all Cleveland stations will be given a full and fair opportunity to obtain the broadcast rights of such teams, and to the extent Ohio obtains these rights, their promotion of the sporting events will be substantially the same as might be expected of any station under similar circumstances.

Finally, it is clear that the separation of WKYC–AM&FM from WKYC–TV advances the Commission's multiple ownership policies in view of the fact that the Commission's rules were recently amended to prohibit the future formation of such ownership combinations. *First Report and Order in Docket 18110*, 22 FCC 2d 306 (1970). The Commission, having found that Ohio Communications, Inc. is fully qualified and that a grant of the application would serve the public interest, convenience and necessity, has, this 5th day of October, granted the assignment of the licenses of Stations WKYC–AM&FM to Ohio Communications, Inc.

Commissioners Robert E. Lee and Reid absent; Commissioner Johnson dissenting and issuing a statement; Commissioners H. Rex Lee and Wiley concurring.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Opinion of Commissioner Nicholas Johnson

Appearing eager to effectuate the policies underlying our multiple ownership rules, the Commission today approves the National Broadcasting Company's assignment of stations WKYC–AM and FM to Ohio Communications, Inc. While I certainly approve of our one-to-a-market rule, and would normally endorse any voluntary action by the networks to rid themselves of offending broadcast interests, I believe that, by giving today's assignment its blessing, the majority has helped a bad situation deteriorate.

Ohio Communications, Inc., is a brand new corporation—designed for the sole purpose of operating stations WKYC–AM and FM. The President, who is also the corporation's major stockholder, has substantial financial interests in several of Ohio's professional sports teams. For this reason, and also because the assignee proposes to broadcast less news, public affairs, and other non-entertainment programming than did NBC, the Cleveland Local of the American Federation of Television and Radio Artists (AFTRA) opposes this assignment.

The majority has no problems with the assignee's intention to broadcast less news, public affairs, and non-entertainment programming. Indeed, the majority has the gall to assert that the assignee's proposals are "fully consistent with Commission policies"—policies which are not here, and have never been, enunciated.

Entering this void which the majority has stubbornly refused to fill, former Commissioner Kenneth Cox and I proposed, in 1968, a subsistence level of news, public affairs, and non-entertainment programming below which no station's audience should have to suffer. See *Oklahoma Renewal Study*, 14 FCC 2d 1 (1968). That minimum standard—and, indeed, it is a very minimum standard—would have provided that licensees must broadcast at least 5% news, 1% public affairs, and 5% other non-entertainment programming. The majority rejected our suggestion in 1968 and, with a consistency which is seldom seen around here, has rejected it again today. For, not only has Ohio Communications reduced to a ridiculously meager level the amount of news and public affairs it intends to broadcast, but it also proposes to allocate only 3.5% of its stations' time to other non-entertainment programming. Without even a moment's hesitation, the majority stamps this arrangement with approval.

Nor is the majority troubled by the assignee's proposal to broadcast most of what paltry public affairs it does contemplate on Sundays—when it will do the least damage to the assignee's commercial interests and when it will, no doubt, attract the smallest audience. In classic fashion, the majority begs the crucial "public interest" question by

satisfying itself that programming "decisions are left to the discretion of the licensee and not altered by the Commission unless not in the public interest."

But perhaps more baffling is the majority's haughty indifference to the danger 1) that the assignee's programming decisions may well be subject to outside influence, and 2) that the assignee's sports interests might carry anti-competitive implications.

First, the assignee's loan agreements provide for certain fixed payments to reduce the borrowings; those agreements also provide that if assignee's net earnings exceed a certain amount, then 50% of said earnings will be paid to the banks to satisfy the loans. The obvious danger in such an arrangement is the possibility that the banks, desirous of having their loans repaid expeditiously from net earnings, might encourage the assignee to devote its broadcast time to what the banks believe are the most lucrative forms of programming. There is also the substantial risk that the content of whatever meager news and public affairs programs *are* presented may be influenced by the financial interests of the banks.

In *The Yankee Network, Inc.*, 13 FCC 2d 1014 (1949), the Commission refused to tolerate such a risk of outside programming influence, stating that an assignee's freedom to operate its station in the public interest "carries with it the duty of independent decision." *Id.* at 1020. The majority, however, maintains that under the instant assignee's financial agreement, the banks will not exercise influence over programming because said banks would lose interest if the loans were repaid in advance of the fixed payment schedule. That, of course, is a highly dubious assumption in that a more rapid repayment of the loans (at a fixed rate of interest), in the context of an economy with rising interest rates, could well prove more advantageous to the banks.

Second, the assignee's principal stockholder and president also controls the local professional sports teams and plans to air their games over his stations. Though the majority at least recognizes the possibility that such an arrangement could have anti-competitive effects, the majority is, nevertheless, content with the fact that "assignee has indicated that steps will be taken to prevent such an occurrence." Nowhere, however, are these "steps" outlined.

The Justice Department has recently sued the networks, arguing that their ownership of the production centers from which they purchase programming violates the antitrust laws. Just as the networks' ownership patterns may foreclose other broadcasters from obtaining programs from such production centers, so the assignee's ownership of the local sports teams might foreclose other broadcasters from having a fair opportunity to air those teams' games.

In the face of such blatant antitrust ramifications, the majority should surely demand more from the assignee than its vague assurances that it will not engage in anti-competitive conduct.

The assignment of stations WKYC–AM and FM to Ohio Communications is thus rampant with problems, problems which may well return to haunt this Commission if, indeed, this Commission is truly concerned about the public interest. It simply makes no sense to sanc-

tion this transfer on the sole ground that NBC is doing some good by divesting itself of some of its broadcast interests. For that good has been more than offset by the problems inherent in Ohio Communication's insidious financial arrangements and programming proposals. Any one of these defects should give the Commission pause. That even this combination of defects fails to move the Commission, however, is perhaps a classic illustration of the anything-for-business stance that has come to characterize this "regulatory" agency.

I think NBC should be encouraged to find another buyer, one that would better serve the Cleveland public. I dissent.

F.C.C. 72-915

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of NEW BROADCASTING CORP., CHARLEVOIX, MICH. Requests: 1270 kHz, 5 kW, Day For Construction Permit	Docket No. 19610 File No. BP-17835

MEMORANDUM OPINION AND ORDER

(Adopted October 12, 1972; Released October 19, 1972)

BY THE COMMISSION:

1. The Commission has for consideration the above-captioned and described application; a "Petition to Deny or, Alternatively, Statement of Objections to Grant"; two supplements thereto filed by the Harrington Broadcasting Corporation (WJML), licensee of stations WJML(AM) and WJML-FM, Petoskey, Michigan; the applicant's oppositions; and WJML's replies.

2. WJML states that its petition is filed pursuant to section 309(d)(1) of the Communications Act of 1934, as amended, and section 1.580(i) of the Commission's rules. WJML recognizes that section 1.580(i) provides, in part, that when the Commission issues a public notice pursuant to section 1.571(c) of the rules listing standard broadcast applications as available and ready for processing, no petition to deny any such application will be accepted after the cut-off date specified in the public notice. WJML argues that, although its petition was filed on April 2, 1969, over a year after the date specified in the public notice listing the New Broadcasting Corp. application (February 6, 1968), the petition should nevertheless be deemed timely since it was filed within thirty days of the filing of an amendment which changed the percentages of corporate stock to be acquired by the original principals. WJML points out that it made known its objections to the establishment of a station in Charlevoix even before the New Broadcasting Corp. application was filed. By letter of March 13, 1967, WJML objected to the then pending application of the Charlevoix County Broadcasting Company (File No. BP-17553). New Broadcasting filed its conflicting application thereafter on July 26, 1967. WJML claims that it had no reason to pursue the matter following the filing of the New Broadcasting application since it appeared that all public interest questions, including newspaper interests held by the New Broadcasting principals, would be explored in a comparative hearing.

3. The first formal action taken on the Charlevoix application was the Commission's approval of an agreement under which Charlevoix County Broadcasting Company would accept reimbursement of its

expenses and dismiss its application. Upon such dismissal, the New Broadcasting application was granted.

4. Subsequently, the Commission reconsidered its action on its own motion, and rescinded the grant to permit a further consideration of the impact of the operation of the proposed station on the concentration of control of the media of mass communications in the northwestern area of the lower peninsula of Michigan. This question arose because of the newspaper interests of W. Albert Schaller, a former majority stockholder (60 percent), who is the controlling stockholder of Northern Michigan Review, Inc., publisher of the Petoskey *News-Review Daily*. Through subsidiaries, Northern Michigan also publishes the Charlevoix *Courier* in Charlevoix and the Otsego County *Herald Times* in Gaylord, Michigan. W. Kirk Schaller, Albert Schaller's son and a minority stockholder in Northern Michigan Review, Inc., an officer and director of that corporation, originally was to acquire a 20-percent interest in New Broadcasting, and Thomas R. McDaniels, general manager of the Charlevoix newspaper, was also to acquire a 20-percent interest in the applicant.

5. Following the rescission of the action in granting the application, the Commission, by letter of January 8, 1969, noted the interest of W. Albert Schaller in the Schaller newspapers, and afforded the applicant an opportunity to amend the application to include data which might demonstrate that a hearing on the concentration question would not be necessary.[1]

6. In response to the Commission's letter, the applicant amended to reduce the interest of Albert Schaller to 40 percent and to increase the interest of Kirk Schaller and McDaniels to 30 percent each. In addition, the applicant supplied data concerning other broadcast services and various publications circulating in the area.

7. It was following the filing of the above amendment that WJML filed its petition. WJML submits that, under the unusual circumstances of this case, its petition should be considered timely. WJML requests that, if its statement is not to be treated as a petition to deny the application, it should be treated as an informal objection under section 1.587 of the Commission's rules.

8. The Commission is not persuaded that the circumstances are such that WJML's statement can be considered a timely petition. Although WJML was not aware that New Broadcasting and the competing applicant had requested approval of a dismissal agreement until the action approving the agreement had been publicly announced, the Commission does not regard the sequence of events as a justification for WJML's unseasonable action in tendering its petition when it did. Section 1.580(i) of the rules does contemplate the acceptance of a petition to deny an application following a significant amendment, but WJML argues that the amendment preceding the filing of its statement made no significant difference in the concentration question. The Commission will, however, consider the petition to deny as an informal objection under section 1.587 of the rules in accordance with our normal practice in such situations.

[1] 15 FCC 2nd 1030.

9. WJML's central contention is directed to the concentration issue. WJML claims that not only was the concentration question presented at the time the application was filed but also remains after several amendments filed in the applicant's obvious effort to meet WJML's objections. Following the first amendment described above, and after further objections by WJML, the applicant filed an amendment reflecting the complete withdrawal of Albert Schaller and the reduction of Kirk Schaller's interest to 20 percent. A new principal, Terry L. Edger, was brought in as a 50-percent stockholder and president of the corporation. Subsequently, Mr. Edger's interest was reduced to 16.7 percent, and two additional principals, N. Elmo Franklin, Jr., and Timothy Ives, are to have interests of 16.65 percent each. In the meantime, Mr. McDaniels, still a proposed 30-percent stockholder, has severed his connections with the Charlevoix *Courier*.

10. The applicant represents that the proposed station will operate independently of the Schaller newspapers, that the only remaining stockholder with newspaper ties is Kirk Schaller who is to be a minority stockholder and will not participate in the day-to-day operation of the station. The applicant also represents that the proposed station will compete vigorously with the Schaller newspapers, and, as previously indicated, has argued that other broadcast services and other periodicals circulating in the area assures that no undue concentration will result from the authorization of the proposed station.

11. The Commission does not share WJML's view that Albert Schaller's role in New Broadcasting must be inquired into in a hearing or that there is any question of his continuing as the dominant figure in the applicant. The application has been amended to show his withdrawal in a manner not unlike the withdrawal of other principals in similar situations.[2] Likewise, the Commission does not find it useful to determine whether Kirk Schaller occupies the position of publisher of the Charlevoix *Courier*, as he allegedly has publicly announced. Kirk Schaller is a 20 percent stockholder, a member of the board of directors and secretary of the applicant, and he is president and a director of the Charlevoix Courier Corporation, which publishes the Charlevoix *Courier;* secretary, a director, and 13.5 percent stockholder of Northern Michigan Review, Inc., which publishes the *News-Review Daily*, in Petoskey, and wholly owns the Charlevoix Courier Corporation; and is president, a director, and 10 percent stockholder of the Otsego County Herald Times, Inc., which publishes the weekly newspaper in Gaylord. Therefore, there is a clear, continuing and substantial connection between the Schaller newspapers and the applicant, and the Commission is not persuaded that the reduction in the extent of such common interest has eliminated the Commission's concern over the media concentration issue. Accordingly, the applicant will be given an opportunity at a hearing to meet the concentration

[2] WJML makes much over a dispute concerning an alleged conversation between Albert Schaller and John Harrington, WJML's president, during which Schaller is said to have expressed an interest in acquiring an interest in WJML and allegedly indicated that he would apply to a station in Charlevoix if he could not acquire an interest in WJML. WJML argues that the matter should be considered in hearing. The Commission fails to see what purpose might be served in resolving a possible dispute between WJML's president and a former New Broadcasting principal.

issue which will be specified. *Cf. Laurence N. Polk, Jr., et al.*, FCC 72R–201, released August 2, 1972.

12. While the Commission is concerned over possible concentration of media in the Charlevoix area, it does not agree with WJML that other media interests of Timothy Ives in the State of Illinois has any relevance to the present considerations. Ives, a minority stockholder in the applicant, has connections with stations WROK(AM) and WROK–FM, in Rockford, Illinois, and with WJBC(AM) and WBNQ(FM) in Bloomington, Illinois. In addition, he is a stockholder, officer and director of a publishing firm which publishes a daily newspaper in Bloomington. None of the Rockford and Bloomington stations serve Charlevoix, and no part of the service areas of the Bloomington and Rockford stations will be served by the proposed Charlevoix stations. There is no allegation that the Bloomington newspaper circulates in Charlevoix or that the Charlevoix *Courier* circulates in either Rockford or Bloomington. The separation between Charlevoix and Rockford is just short of 300 miles, and the separation between Charlevoix and Bloomington is almost 400 miles. The Commission fails to see the relevance of Ives' interests in Illinois to the question of concentration in Michigan.

13. WJML is highly critical of the applicant's financial plan which has been amended on several occasions. Indeed, WJML's criticisms go into minute detail. For example, WJML suggests some impropriety on the part of some of the principals in listing the surrender value of insurance as an asset without indicating a willingness to surrender the insurance. WJML goes to great lengths in an effort to demonstrate the inadequacy of the applicant's construction and operating cost estimates, and there are numerous other allegations purporting to support WJML's view that the applicant is not financially qualified.

14. It is true that the applicant's estimates do not equal the amounts that WJML insists are necessary, but the applicant's estimates are equal to or greater than estimates by other applicants proposing similar operations which have been found in the past to be adequate. As for the supposed unwillingness on the part of some of the principals to surrender their insurance, it is not material since surrender of an insurance policy is not necessary in order to obtain cash value of a policy as a loan. The Commission has considered all of WJML's allegations going to the financial qualifications of the applicant and its principals and finds them without merit.

15. Nevertheless, the Commission finds that it would not be appropriate to determine the applicant's financial qualifications on the basis of the financial information which is not now current. Therefore, a financial issue will be specified to permit a determination of the applicant's financial qualifications on the basis of current data.

16. A further contention of WJML is that the applicant has not adequately ascertained the community problems in the area. The Commission has examined the applicant's exhibits supporting its statement of program service and finds that there have been discussions with community leaders and members of the general public which appear to constitute a reasonable cross-section of the prospective listeners.

We note that the projected time segments for all the programs proposed in response to the ascertained problems have not been clearly identified. The applicant has informed the Commission, however, that its major public interest broadcasting program, "The Morning Show," will be aired from "sign-on" to 8:30 a.m., Monday through Friday. Its other proposed programs can be best characterized as public service announcements, and hence the specification of an exact time segment is not required. Accordingly, the Commission finds the applicant's showing is in substantial compliance with the requirements of the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 36 FR 4092, 27 FCC 2d 650, 21 RR 2d 1507 (1971).

17. The Commission has examined WJML's other contentions and finds that they too are without merit.

18. Although the Commission is not treating WJML's objection and supplements as a petition to deny the application, WJML nevertheless is an interested party and does have standing to intervene in the proceeding on the New Broadcasting application. WJML will therefore be named a party to the proceeding. The issues to be tried in the hearing are such that it is appropriate to place the burden of proceeding with the introduction of the evidence and the burden of proof upon the applicant.

19. Except as indicated by the issues specified below, the applicant is qualified to construct and operate the proposed station. In view of the matters discussed above, however, the Commission is unable to make the statutory finding that a grant of the application would serve the public interest, convenience and necessity, and is of the opinion that the application must be designated for hearing on the issues set forth below.

20. Accordingly, IT IS ORDERED, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the application IS DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, in light of the newspaper interests of principals of the New Broadcasting Corp., whether a grant of the application would result in an undue concentration of control of the media of mass communications in Charlevoix, Michigan, and vicinity.

2. To determine whether the applicant is financially qualified to construct and operate its proposed station.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

21. IT IS FURTHER ORDERED, That the Harrington Broadcasting Company, licensee of stations WJML(AM) and WJML-FM, Petoskey, Michigan, IS MADE A PARTY to the proceeding.

22. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of the evidence and the burden of proof with respect to the issues herein shall be upon the applicant.

23. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant and party respondent, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

24. IT IS FURTHER ORDERED, That the applicant shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-917

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of NORTHWESTERN COLLEGE (KFNW), FARGO, N. DAK. Has: 900 kHz, 1 kW, Day Requests: 1170 kHz, 1 kW, Day For Construction Permit	Docket No. 19313 File No. BP-18271

MEMORANDUM OPINION AND ORDER

(Adopted October 12, 1972; Released October 19, 1972)

BY THE COMMISSION:

1. The Commission has before it for consideration the above-captioned application requesting a change in frequency.

2. On September 8, 1971, this application was designated for hearing because the proposed service area would encompass 8,235 less square miles and 59,316 fewer persons than KFNW's present operation. While in hearing, KFNW petitioned for leave to amend its application to demonstrate that the loss in service was not as great as originally indicated in the application. The applicant's request was granted, the amendment accepted, and the application returned to the processing line.

3. Examination of the engineering data, as amended, indicates that a grant would eliminate interference with station KTIS, Minneapolis, Minnesota (under common ownership with KFNW), in an area containing an estimated population of 17,818 people. On the other hand, however, the applicant's data also indicate that the proposed service area encompasses 3,061 less square miles and 25,922 fewer persons than the station's present operation. Inasmuch as station KFNW is the only specialized religious broadcast service in the Fargo area, a grant of the application would deprive a significant portion of the present service area of KFNW of its only specialized religious broadcast service. On the other hand, there are several specialized religious broadcast services in the Minneapolis area, including station KTIS, and elimination of the interference with KTIS would enable KTIS to provide simply another such service to the area and population it will gain in that area. Since there already appears to be a multiplicity of radio services in both the Minneapolis and Fargo areas, a substantial question obtains, due to the loss of specialized religious broadcast service in the Fargo area, as indicated above, as to whether the public interest would be served by a grant of this application.

4. Except as indicated by the issues specified below, the applicant is qualified to construct and operate as proposed. In view of the foregoing, however, the Commission is unable to make the statutory finding that a grant of the subject application would serve the public interest, convenience, and necessity, and is of the opinion that the application must be designated for hearing on the issues set forth below.

5. Accordingly, IT IS ORDERED, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the application IS DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of station KFNW and the availability of other primary aural (1 mV/m or greater in the case of FM) service to such areas and populations.

2. To determine whether the loss of religious broadcast service to the Fargo, North Dakota, area and the gain of such service to the Minneapolis, Minnesota, area are in the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

6. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the applicant, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

7. IT IS FURTHER ORDERED, That the applicant shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-936

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST FOR WAIVER OF THE "OFF-NETWORK" AND "FEATURE FILM" RESTRICTIONS OF THE PRIME TIME ACCESS RULE (SECTION 73.658 (k)(3)), FILED BY STATION WUHQ-TV, BATTLE CREEK, MICH.

MEMORANDUM OPINION AND ORDER

(Adopted October 18, 1972; Released October 19, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission here considers a "Petition for Waiver of Prime Time Access Rule" filed on September 8, 1972, by Channel 41, Inc. (WUHQ), licensee of UHF Station WUHQ-TV, Battle Creek, Michigan (included in the Grand Rapids-Kalamazoo market and ABC-affiliated).[1] The request is for waiver—for the entire 1972-73 season—of the "off-network" and "feature film" restrictions of the rule, contained in Section 73.658(k)(3). The petition, which was served on the other three stations in the market and has not been opposed, is based on two main lines of argument: (1) WUHQ's status as a new and struggling UHF station, still losing money so that having to purchase first-run syndicated material to comply with the rule would be a serious hardship and, indeed, would severely affect the station's operations during a vulnerable period; and (2) the highly unique circumstances of this market, where there are *four* network-affiliated stations rather than the usual three, which is said to mean that waiver to WUHQ would not significantly affect the attainment of the rule's objectives (clearing prime time on three network stations in each market), and that grant here would not be a significant precedent for requests elsewhere.

2. In connection with the first point, WUHQ mentions that the station began operation in July 1971, lost over $400,000 in the first year of operation, and is still losing thousands of dollars per month (in addition to an expensive new antenna required in April 1972 after lightning damage); and asserts that denial of waiver at this time—for example, having to buy five first-run syndicated program episodes per week at as much as $800 per episode—would severely affect its future viability. WUHQ cites the Commission's vigorous efforts to promote the development and economic well-being of UHF stations,

[1] On September 27, 1972, temporary waiver was granted WUHQ until October 29, 1972, to permit the Commission to consider this request on its merits.

including statements in the Report and Order adopting the prime time access rule to the effect that the rule will increase the capacity of alternative, non-network program sources (previously handicapped by lack of available prime time on network-affiliated stations) to supply programming for independent stations, particularly still-struggling UHF independents, and thus "the entire development of UHF should be benefitted." (Report and Order in Docket 12782, May 1970, pars. 21, 23, 23 FCC 2d 382, 394–395, 18 R.R. 2d 1825, 1842–1844). It is said that with this in mind, it would be contrary to our fundamental policies to enforce any rule which would in effect impede the progress of a UHF station, as would occur here in the absence of waiver at this time. WUHQ also calls attention to its situation in having to compete with three established VHF stations in the market, plus network stations in two markets fairly close by which cover Battle Creek or other communities served by WUHQ (Lansing and South Bend). It is stated that the financial picture is expected to improve within the next year or two, "provided such unforeseen items as the prime time access rule" do not hamper progress.

3. WUHQ asserts that it is not seeking to avoid local origination or new filmed material entirely; but its local news is at 5:30, before prime time, and if it must run an hour a day of new first-run filmed material, it would soon exhaust its supply. If waiver is granted, it will fill the "access period" with a mixture of new material, off-network re-runs, and "time-tested film packages". This program material, it is anticipated, will be well received in the Grand Rapids-Kalamazoo-Battle Creek area. According to information submitted after its petition, as far as its weekday schedule is concerned, WUHQ presents local news at 5:30, network news at 6 (the same time as WZZM–TV, the ABC VHF affiliate, from which WUHQ picks up ABC programs), the off-network "Man from U.N.C.L.E." series from 6:30 to 7:30 and a first-run syndicated program (It's Your Bet) from 7:30 to 8.

4. The other main line of argument relates to the fact that in this market there are four affiliated stations, ABC being affiliated with WZZM–TV, Grand Rapids VHF, as well as WUHQ–TV (the CBS and NBC affiliates are also VHF). It is urged that therefore adherence by WUHQ–TV to the rule is not necessary to achieve its objectives—clearance of prime time to the extent of one hour a night on affiliated stations—which is met as long as the usual number of affiliated stations (three) comply. It is claimed that waiver here will not be a precedent for a number of other waivers, but will simply recognize the "truly unique circumstances" which apply in this case.

DISCUSSIONS AND CONCLUSIONS

5. After carefully considering the foregoing request, in our judgment it must be denied. The reason is fundamentally a simple one: when it comes to considering requests for extensive waiver such as that involved here (for a full year, rather than "one-time" requests), there is a strong presumption that Commission rules which, by their terms, apply to a particular group of stations or other parties, should apply alike to all entities covered by the rule. The presumption is of course rebuttable, but nonetheless it is a strong one, and this is particularly true

where the entities subject to the rule are in competition with each other. We simply do not find the circumstances urged here, noted above, sufficient to rebut this presumption.

6. In this connection, we clearly cannot accept the argument (par. 2, above) that it would be contrary to our fundamental policy "to enforce any rule which would have the effect of impeding the progress of a UHF station." We have in the past taken substantial steps to further the cause of UHF development, for example in relaxing technical requirements and in scrutinizing closely, from a "UHF impact" standpoint, all proposals for new VHF channel assignments or changes in existing VHF facilities. But we have never gone anything like as far as suggested in this statement; and it would clearly be inappropriate to do so here. The Prime Time Access Rule applies to all affiliated (or network-owned) stations in the top 50 markets, whether VHF, UHF in all-UHF markets (Wilkes-Barre-Scranton was included in the rule for the first year) or UHF stations in "intermixed" markets such as this one and several others (e.g., Dayton, Charlotte, Louisville and Birmingham). We have so held in denying waivers for an extended period sought by two UHF stations, WKEF–TV, Dayton, and WLKY–TV, Louisville (although later granting the latter a waiver for a "one-time" situation). See 32 FCC 2d 151 (October 1971) concerning these stations. We note in this connection that WUHQ claims some consideration as a new station, but in fact it has now been in operation over 14 months. In sum, WUHQ–TV has been operational for over a year, and has the benefits of being a network affiliate in a major market. As such, it must abide by the rules applicable to such stations.[2]

7. We also cannot agree that the objectives of the rule are fulfilled with respect to this market without applying the regulation to this station. The objectives of the rule are, generally, to open up prime time in major markets for alternative sources of new program material, clearing it of network programs and also of "off-network" material and recently run feature films. There is nothing in the history of the adoption of the rule to suggest that this objective or its fulfillment are limited to three stations per market, even though typically that is the way the rule operates. Rather, it does, and should, apply to all stations in major markets which have the benefits of network affiliation.

8. It also appears that grant of waiver here could not be isolated, as far as precedential significance is concerned, to the extent WUHQ believes. This is true basically for two reasons: *first*, aside from the CBS and NBC affiliates in this market, it would be almost impossible to deny waiver to WZZM–TV, the VHF ABC affiliate, if it should seek it in light of grant to WUHQ–TV. *Second*, there is one other market where a similar situation would be presented, and there is likely to be at least one more in the near future. As to the first, we

[2] We do not reach here the question of whether a truly *new* station (which would almost inevitably be UHF) would be a proper subject for waiver of this rule. In view of the time lag between a station's going on the air and its inclusion in ARB's *Television Market Analysis*, and the further time between the annual issuance of that publication and its effect in terms of the rule, it is doubtful that such a situation would ever arise. Certainly, where the station has been operational for more than a year, waiver on this ground does not appear appropriate.

have to bear in mind three circumstances: (1) WZZM–TV and WUHQ–TV are particularly in competition with each other, since they both carry ABC programs, with respect to material adjacent to those programs (access-period material and "adjacencies"); (2) WUHQ–TV, situated in a desirable central location in the market, probably has at least comparable potential with WZZM–TV for serving the entire market, since the latter is well to the north of Grand Rapids;[3] (3) we recently acted to terminate the WZZM–TV VHF translator operation at Kalamazoo, in order to increase the potential for WUHQ–TV development. The last fact alone would almost inevitably indicate that waiver would be required in one case if granted in the other, even though WZZM–TV has not opposed the WUHQ request. See *West Michigan Telecasters, Inc.*, 32 FCC 2d 630 (December 1971). Thus, grant here would mean, almost necessarily, a waiver for WZZM–TV also, which would be an additional derogation of the objective of the rule.

9. Moreover, while the circumstance of four affiliated stations in a market is unusual, it is not unique. The same is true in one other "top 50" market (Hartford-New Haven, Connecticut, where NBC has two UHF affiliates), and may well be true in another in the near future (Tampa-St. Petersburg, Florida; a UHF station at Sarasota went on the air as an ABC affiliate in late 1971, and may be included in the Tampa-St. Petersburg market in the next issue of ARB's Television Market Analysis).[4] Attention might well have to be given to all of these situations if waiver were to be granted in the present case.

10. One remaining point is that it does not appear that WUHQ–TV would find it impossible to comply with the rule without severe hardship. As indicated in paragraph 3, above, at least as far as weekdays are concerned, the station already presents a half-hour of new nonnetwork material from 7:30 to 8. It appears that, if it wished, it could shift its local news (now at 5:30) to 7, an hour at which some 50 stations in the top 50 markets broadcast their early-evening local news.

11. In sum, we do not find in the circumstances here (unusual but not unique) ground for waiver of the rule as asked on behalf of Station WUHQ–TV. Accordingly, IT IS ORDERED, That the "Petition for Waiver of Prime Time Access Rule" filed on September 8, 1972 by Channel 41, Inc. (WUHQ–TV, Battle Creek, Michigan) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] WUHQ–TV is located in the same general area (in Barry County) as the long-established CBS and NBC VHF stations, between Grand Rapids and Kalamazoo. Like them, it puts a predicted Grade A signal over Grand Rapids, Kalamazoo and Battle Creek, and a Grade B over Muskegon, the fourth urban center in the area. WZZM–TV, on the other hand, uses a channel assignment which was "dropped in" at Grand Rapids in 1961, and on which a station has to be some 25 miles northwest of that city to meet minimum mileage separation requirements. Therefore, while it puts a principal-city signal over Grand Rapids and Muskegon, Kalamazoo, and Battle Creek lie outside of its Grade B contour. We have in the past denied an application to permit the station to move closer in. *West Michigan Telecasters, Inc.*, 22 FCC 2d 943 (1970).

[4] The facts of the latter situation are quite similar to those here, the VHF ABC affiliate being located well to the north of the central cities and ABC also having an affiliation with a UHF station to the south.

This analysis does not include another "top 50" market, where a regular VHF affiliate and a small UHF station have both been carrying NBC evening programs, but which apparently does not present possible problems in this respect (Greenville-Spartanburg-Asheville, S.C.–N.C.).

109–013—72——5

F.C.C. 72-900

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
WAIVER OF THE PRIME TIME ACCESS RULE (SECTION 73.658(k)) FOR "ONE TIME" NETWORK NEWS AND PUBLIC AFFAIRS PROGRAMS (REQUEST OF COLUMBIA BROADCASTING SYSTEM, INC.)

MEMORANDUM OPINION AND ORDER

(Adopted October 5, 1972; Released October 11, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, REID AND HOOKS ABSENT; COMMISSIONER JOHNSON DISSENTING; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. The Commission has before it the second portion of a "Request for Waivers" filed by Columbia Broadcasting System, Inc. (CBS), on June 26, 1972, seeking waiver of the prime time access rule (Section 73.658(k)) with respect to news and public affairs programs. The request involved here is for continuation during 1972–73 of the waiver, granted October 6, 1971, for the 1971–72 year, for "one-time-only" network news and public affairs programs, those not part of a series. Under the waiver, this material may be presented by stations during prime time without counting against the permissible three hours of network programming each evening during prime hours. This request has been supported by the other two networks, ABC and CBS, and opposed by Westinghouse Broadcasting Co. Inc. (Westinghouse).[1]

2. Because of the press of other matters, the Commission has not had an opportunity to consider the CBS request, and responsive pleadings, on the merits. Pending such decision, it is appropriate to extend the waiver for a brief period of about three months, in order to give opportunity for full consideration.

The October 1971 decision granting this waiver for 1971–72 is reported at 32 FCC 2d 55, 23 R.R. 2d 77.

3. In view of the foregoing, IT IS ORDERED, That waiver of Section 73.658(k)(1) of the Commission's Rules, the prime time access rule, IS GRANTED to the American Broadcasting Companies, Inc.

[1] We have previously considered and granted the other requested waiver in the CBS pleading, which was not opposed: that for waiver for stations presenting a half-hour of network news at the beginning of prime time following a full hour of local news. See Memorandum Opinion and Order, FCC 72-783, adopted August 29, 1972.

(ABC), Columbia Broadcasting System, Inc. (CBS) and National Broadcasting Company, Inc. (NBC) networks, and their owned and affiliated stations in the top 50 markets, to present, without counting toward the permissible three hours prime time network material, "one-time only" news and public affairs programs, through December 31, 1972.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

37 F.C.C. 2d

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
RICHARD L. COLBY, MASTIC, N.Y.
Concerning Section 315, Equal Opportunities by Station WNEW–TV

OCTOBER 6, 1972.

Mr. RICHARD L. COLBY,
Liberal Party Candidate, State Assemblyman, 45 Eleanor Avenue, Mastic, N.Y.

DEAR MR. COLBY: This is in response to your letter dated September 4, 1972 concerning licensee obligations under the "equal opportunities" provision of Section 315 of the Communications Act of 1934.

In particular, you state that on July 2, 1972 your incumbent opponent for election to the New York State Assembly appeared during a weekly program broadcast by Station WNEW–TV. You further state that on July 20, 1972 you submitted a written request to the station for equal time as an opposing candidate and that such request was refused. Your letter asks the Commission to review the propriety of that refusal.

Section 73.657(e) of the Commission's Rules states the following in implementation of Section 315 of the Communications Act:

> A request for equal opportunities must be submitted to the licensee within one week of the day on which the first prior use, giving rise to the right to equal opportunities, occurred. * * *

The purpose of this rule is to give the licensee notice of his obligation to accord other opposing candidates equal opportunities and to thereby allow the licensee a reasonable opportunity to make adequate provision in his program schedule for meeting such Section 315 obligations (Report and Order of April 29, 1970, FCC 70–456). Since your request for equal time was not submitted to WNEW–TV within one week of the original broadcast in which your opponent appeared, the licensee could properly refuse such request in reliance on this rule and policy.

Your letter also objects to the fact that you received no notice of the appearance of your opponent on the program in question from WNEW–TV. In this regard it should be noted that while Section 73.657(d) of the Commission's Rules requires a station to maintain a public record of all requests for time by or on behalf of political candidates, together with a record of the disposition of such requests, no affirmative duty is imposed upon a station to advise a candidate or political party that broadcast time has been sold to an opposing candidate or that an opposing candidate has otherwise appeared over the station.

It is finally noted that the copy of WNEW–TV's reply to your request which you have submitted states that your opponent appeared on a regularly scheduled news interview program to be questioned on the accomplishments and failures of the recent legislative session. Section 315 of the Communications Act states:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station. * * * Appearance by a legally qualified candidate on any—* * *.
>
> (2) bona fide news interview * * * shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

For your further information we are enclosing a copy of the Commission's Public Notice of March 16, 1972, entitled "Use of Broadcast and Cablecast Facilities by Candidates for Public Office."

For the aforementioned reasons, Station WNEW–TV's refusal of your request was proper and poses no violation of Section 315 of the Communications Act or of the Commission's implementing rules and policy.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

F.C.C. 72-886

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
NATIONAL BROADCASTING CO., INC.
For Interpretive Ruling Concerning
Equal Opportunities (Sec. 315)

OCTOBER 5, 1972.

NATIONAL BROADCASTING CO., INC.,
RCA Building,
30 Rockefeller Plaza,
New York, N.Y.

GENTLEMEN: This refers to your letter of September 29, 1972, requesting an interpretive ruling on the applicability of the equal opportunities requirement of Section 315(a) of the Communications Act of 1934, as amended, to a proposed broadcast of an appearance by a legally qualified candidate for public office who is not otherwise identified.

You state that you have been notified by a representative of the Commissioner of Baseball that plans for the pregame ceremonies of one of the World Series games (probably that of October 15) include the presentation of an award to Jackie Robinson commemorating the 25th anniversary of his joining the Brooklyn Dodgers as well as his work in the field of drug addiction; that the award is to be presented by a person who is a legally qualified candidate for public office to be voted on November 7; that other participants in the award ceremony will be the Commissioner of Baseball, the Presidents of both major leagues, and Larry Doby, the first black player in the American League.

You state that you would cover the presentation as a part of your live broadcast of the pregame ceremonies if no candidate for public office were appearing, and that in your opinion the broadcast of the presentation should be ruled exempt from the equal opportunities requirement of Section 315(a) as on-the-spot coverage of a bona fide news event, since in the judgment of NBC both the World Series and the award presentation itself are newsworthy events, and NBC's coverage is not for the purpose of promoting the fortunes of a candidate.

You cite *Republican National Committee*, 40 FCC 408, 411 (1964), in which the Commission quoted Chairman Oren Harris to the effect that the term "bona fide," as used in Section 315(a)(4) ". . . sets up a test which appropriately leaves reasonable latitude for the exercise of good faith news judgment on the part of broadcasters and [that] it is not intended that the exemption shall apply where such judgment

is not exercised in good faith [but rather] for [the] purpose [of promoting] the political fortunes of the candidate making the appearance." You point out that it was the Congressional intent in enacting the Section 315 exemptions to reverse the Commission's approach in the *Lar Daly* case, 18 R.R. 238, affirmed 26 FCC 715 (1959) which involved the broadcast of a ceremonial event participated in by a person who was also a candidate for office, citing Senate Report No. 562, 86th Cong., 1st Sess., July 22, 1959.

You state that although you would cover the pregame ceremonies here if no candidate were appearing, you would be exposed to equal opportunity obligations to numerous other candidates for the same public office if the appearance of the candidate making the award is not considered exempt from the equal time requirements of Section 315(a).

On the basis of the facts presented, the Commission finds no reason to believe that your judgment regarding the proposed event is either unreasonable or made in bad faith. You state that you believe the event to be newsworthy and that you would broadcast it if no candidate for public office were appearing. Although we ruled in *Lar Daly*, *supra*, that an appearance by a candidate in a ceremonial event entitled his opponents to equal opportunities, Congress amended Section 315(a) soon thereafter to make clear its intention that appearances by candidates during "on-the-spot coverage of bona fide news events . . . shall not be deemed to be use of a broadcasting station within the meaning of this subsection." Thereafter, we ruled in our 1963 *Letter to Lar Daly*, 40 FCC 377, that an appearance by his opponent during a televised St. Patrick's Day parade was not a use entitling Mr. Daly to equal opportunities, and we have followed such an interpretation in later rulings. This particular case would appear to fall within the Congressional exemption and would not undermine its limited nature, cf. *Marietta Broadcasting Inc.*, 40 FCC 366 (1962) (Nixon-Brown debate); reconsideration denied in *Letter to NBC and CBS*, 40 FCC 370.

Accordingly, on the basis of the information before us we find no justification for overruling your judgment that the proposed award ceremony would be a bona fide news event within the meaning of Section 315(a)(4) of the Communications Act.

Commissioners Robert E. Lee and Reid absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-810

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by TIMNANKIN, INC., SEATTLE, WASH. For Reinstatement of Authority for Radio Station KOOD, Lakewood, Wash. to Remain Silent	File No. BR-3760

SEPTEMBER 13, 1972.

Mr. ROBERT D. COOPER,
President, Timnankin, Inc., 5648 39th West, Seattle, Wash.

DEAR MR. COOPER: This is in reference to your letter of March 21, 1972, wherein you request that the authority for Radio Station KOOD, Lakewood, Washington, to remain silent be reinstated. For the reasons set forth below, your request is denied and the KOOD application for renewal of license (BR-3760) is hereby dismissed.

By way of background, we note that on January 6, 1969, Timnankin, Inc., licensee of KOOD, filed an application for renewal of the station's license. On April 7, 1969, the Chief, Broadcast Bureau, pursuant to delegated authority, granted that application. Thereafter we received your letter of April 29, 1969, advising the Commission that KOOD would discontinue broadcasting, effective 6:00 p.m., May 1, 1969, for financial reasons, and that you had "no immediate plans to return the station to the air." By letter of May 16, 1969, you were advised that, in view of KOOD's silence, the Commission on May 6, 1969, had rescinded the grant of your application for renewal of license, and that the application had reverted to pending status. You were also notified that authority was thereby granted for the station to remain silent through June 30, 1969. KOOD has remained off the air since May 1, 1969.

On June 27, 1969, you were granted an extension of the authority for KOOD to remain silent through September 28, 1969. You were advised that "[a]bsent the filing of an application for assignment of the license or resumption of operation during the authorized period, no further extension . . . [would] be anticipated." Subsequently, on September 24, 1969, the Commission received an application for the assignment of KOOD's license from Timnankin, Inc. to Mr. Kevin B. Sweeney (BAL-6789). Accordingly, we granted an extension through December 27, 1969, of the authority for KOOD to remain silent, pending Commission action on the assignment application. On December 29, 1969, and March 27, 1970, further extensions were granted through March 29 and June 25, 1970, respectively, pending Commission action on the assignment application.

The Chief, Broadcast Bureau, pursuant to delegated authority, granted the assignment application on April 6, 1970, and informed you by telegram on that date that it was necessary for the assignment to be consummated within forty-five (45) days of the grant. Concurrently, the Chief, Broadcast Bureau also granted the application for renewal of license for KOOD. Certain conditions were imposed on the grant of the renewal application, namely: (1) that the assignment of license be consummated within forty-five (45) days of the date of the grant, and (2) that the station resume broadcasting not later than sixty (60) days after the date of the grant.

Before the assignment could be consummated, however, Mr. Sweeney became concerned about a Commission inquiry which had been initiated to determine whether Star Stations or their principals or employees had participated in certain violations of the Communications Act of 1934, as amended, other Federal statutes, or the Commission's Rules (Docket No. 18807). Mr. Sweeney had served as a sales consultant to the Star Stations from 1965 to 1969. In correspondence with the Commission he stated that he wanted the Broadcast Bureau to review the testimony he had given in Docket No. 18807 and to determine whether any question had been or could be raised with respect to his qualifications as a licensee. Despite assurances given by the Chief, Broadcast Bureau that "no problems whatsoever . . . [had] been raised with respect to . . . [his] qualifications to be a Commission licensee," Mr. Sweeney, by telegram of December 20, 1970, informed the Commission that he would not consummate the assignment of the license of KOOD. As a result, since KOOD's license renewal was conditioned upon consummation of the license assignment, the license renewal grant was rescinded: *i.e.*, it was declared null and void and, thus, it reverted to pending status.

Thereafter, on May 24, 1971, in response to your telegram and letter of May 6, 1971, we reinstated and extended the silence authorization for KOOD through June 30, 1971. This action was taken on the basis of your representation that you had "found a spark of local Lakewood interest" for the purchase of the station. In this regard, however, we stated the following:

> Although you have apparently found some local interest for the purchase of the station, otherwise there do not appear to be any definite plans to return KOOD to the air. Hence, in view of the fact that KOOD has been silent for a period of two years, absent filing of an assignment application or resumption of operation by June 30, 1971, no further extensions of the station's silence authorization will be granted. If no assignment application is filed or if KOOD does not resume broadcast operations by June 30, 1971, Timnankin, Inc.'s license renewal application for the station, which has been pending since January 6, 1969, will be dismissed pursuant to Section 1.568(b) of the Commission's Rules. 47 C.F.R. Section 1.568(b).

Subsequently, by letter of June 10, 1971, you requested a further extension so that you would have time to pursue negotiations for sale of the station. On June 21, 1971, we granted your request by extending the authority to remain silent to September 30, 1971.

By letter of July 19, 1971, you were advised that your annual license fee had been due on February 1, 1971, and had not been received at the Commission. It was stated that you should submit the fee within

fifteen (15) days from the receipt of the letter. Upon your failure to respond to this request, a second notice was sent on August 30, 1971. To date, you have not responded to either notice.

Then, by letter of September 1, 1971, you were forwarded FCC Forms 303 and 323 to be used in preparation of a supplement to your pending application for renewal of license. You were advised that "[y]our supplemental renewal application should be submitted no later than November 3, 1971," and that "[y]our annual license fee is due on February 1, 1972." To date, you have filed neither the requested supplemental renewal application, nor the annual license fee. Indeed, you have not in any way acknowledged the letter of September 1, 1971.

Most recently, on November 18, 1971, we reinstated and extended the authority for KOOD to remain silent through January 1, 1972. In taking that action we stated the following:

> Although we recognize that you have encountered difficulties in your attempts to sell KOOD, we cannot permit the station to remain silent indefinitely. Therefore, absent the filing of an acceptable assignment application or resumption of broadcast operations by January 1, 1972, no further extensions of KOOD's silence authorization will be granted.

Now, by your letter of March 21, 1972, you ask that the Commission reinstate KOOD's authority to remain silent. To support this latest request, you state that "Mr. Clay Huntington, Pierce County Commissioner, and owner of KLAY–FM, Tacoma . . . has . . . indicated interest in making application" for assignment of the KOOD license. You then go on to note that Mr. Huntington's "interest is restricted at the moment to the license only, not the physical assets of KOOD, or Timnankin liability, remedy for which is being pursued by a breach of contract suit in King County against Kevin Sweeney." The silence authorization is requested in order to provide time to negotiate a sale agreement and file an assignment application.

From the foregoing, it is apparent that you intend to assign only a bare license. In this regard, please be advised that a bare license is not an asset which can be assigned for consideration. *Edward B. Mulrooney*, 13 FCC 2d 946 (1968). Moreover, even if you contemplate an assignment of more than a bare license, we observe that Mr. Huntington has only "indicated interest in making application." Faced with only the mere possibility that an application might be forthcoming, we are left unable to predict a date by which the station might resume broadcasting. Further, given your past record of unsuccessful attempts to assign the license, we find that reinstatement of the silence authorization on the basis of Mr. Huntington's vague "interest" is unwarranted.

Finally, if accepted for filing, the pendency of an assignment application would preclude us from deleting the KOOD facility and selecting on a comparative basis the best qualified de novo applicant for the frequency. *Cherry Hill Broadcasters, Inc.* (FCC 72–350).

In summary, then, we find that (1) KOOD has been silent since May 1, 1969, a period of more than three years; (2) you have failed to submit your annual license fees and to respond to notices advising you to pay those fees; (3) you have not filed the requested supplemen-

tal renewal application; (4) you have not filed an acceptable assignment application; (5) KOOD has been silent without Commission authorization since January 1, 1972; and (6) your latest request for silence authorization is supported only by the fact that a prospective assignee has "indicated interest" in filing an application that, were it filed, apparently could not be granted.

Therefore, as stated above, the request for reinstatement of silence authorization is denied and the renewal application of KOOD (BR-3760) is hereby dismissed pursuant to Section 1.568(b) of the Commission's Rules, effective as of the date of this letter, thus terminating the station's authorization to operate and deleting the KOOD call letters as of that date.

Please be advised that written assurance must be given by return mail that prescribed tower lighting will be maintained until such time as the tower structure is dismantled or relicensed for broadcast transmission purposes.

Commissioners Robert E. Lee and Reid absent; Commissioner Johnson concurring in the result.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-913

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application by TOMAHAWK BROADCASTING CO., ASSIGNOR and GOETZ BROADCASTING CORP., ASSIGNEE For Assignment of License	File No. BAL-7542

OCTOBER 12, 1972.

TOMAHAWK BROADCASTING CO.,
81 Mohawk Drive
Tomahawk, Wis.
GOETZ BROADCASTING CORP.,
P.O. Box 297
Monroe, Wis.

GENTLEMEN: On October 12, 1972, the Commission granted the application for assignment of the license of Station WELF, Tomahawk, Wisconsin from Tomahawk Broadcasting Company to Goetz Broadcasting Corporation (BAL-7542).

The grant fee has been computed on the following basis:

Station building and equipment	$44,800
Covenant not to compete	15,000
Station land	13,000
Total consideration for grant fee purposes	72,800

With respect to $13,000 figure for land, as you will recall during the processing of the application, the staff had questions regarding the "lease option agreement" since it called for "lease" payments totaling $16,800 over a 7.25 year term for property with an expressed worth of $4,200 at the end of the term. In response you advised that the fair market value of the property was actually $13,000 (26 acres at $500 per acre) and that annual lease payments on property of this type range between 13% and 15% of the fair market value. Analysis of this information indicates: 1) that normal lease payments are nearly as much as those described in the "lease option" agreement and therefore the $4,200 option price is inordinately low; and 2) that an agreement to purchase this property over the same term at 8½% interest would be almost the same as the lease payments and option price under the agreement ($21,011 vs $21,000). Based on the foregoing analysis, it was determined that the "lease option" agreement should be treated as a contract for the sale of property for grant fee purposes and therefore its full fair market value should be included in the fee computation.

In view of the above, you are hereby advised that the grant fee imposed on this transaction and payable upon consummation is $1,456.00.

Commissioner Johnson dissenting and Commissioner Wiley concurring.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-299

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of VOICE OF REASON, INC. (KICM), GOLDEN, COLO. For Construction Permit	Docket No. 18710 File No. BP-18553

APPEARANCES

Jerome J. Duff and *Benedict P. Cottone*, on behalf of Voice of Reason, Inc.; *Joseph Stirmer*, *Vergil W. Tacy* and *Philip V. Permut*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted October 12, 1972; Released October 20, 1972)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. This proceeding involves the application of Voice of Reason, Inc. (Voice of Reason) for authority to operate the former facilities of standard broadcast Station KICM, Golden, Colorado.[1] In its application, Voice of Reason also sought interim operating authority for the station, and pursuant to Section 309(f) of the Communications Act of 1934, as amended, the Commission granted this request for a 90-day period. See 17 FCC 2d 431, 15 RR 2d 1382 (1969). A 90-day extension of this authorization was granted on July 23, 1969, FCC 69-809. On October 22, 1969, however, the Commission designated the Voice of Reason application for hearing on an unauthorized transfer of control issue and, at the same time, ordered discontinuance of the Voice of Reason temporary operation.[2] FCC 69-1158. Pursuant to petitions to enlarge issues filed by the Broadcast Bureau, the Review Board added an *ex*

[1] By Commission Order, FCC 68-989, released October 9, 1968, the renewal application of the former licensee, George I. Norman, Jr., and Philip B. Rosenthal, Joint Venturers d/b as Norman Broadcasting, was designated for hearing on several issues, including an unauthorized transfer of control issue. (Docket No. 18344.) On March 26, 1969, however, the licensee surrendered its license and the Commission thereafter cancelled it and deleted the call letters. The Presiding Judge, by Order, FCC 69M-438, released April 14, 1969, terminated the renewal proceeding. Reportedly, Norman took full control of the licensee from Rosenthal in 1961. See Bill of Particulars filed by the Broadcast Bureau in Docket No. 18344 proceeding on October 16, 1968. The Board will, for the sole purpose of this Decision, regard George I. Norman, Jr. (hereinafter Norman) as the licensee of KICM.

[2] A request for special relief and extension of temporary operating authority, and a petition for reconsideration of the designation Order were denied by the Commission on October 30, 1969, and February 11, 1970, respectively. See 20 FCC 2d 291 and 21 FCC 2d 487. Voice of Reason sought judicial review of the Commission's designation Order; however, on May 26, 1970, the United States Court of Appeals for the District of Columbia dismissed the applicant's appeal. Case No. 24,023.

parte issue, and misrepresentation, financial, and Rule 1.65 issues.[3] See 22 FCC 2d 931, 18 RR 2d 1049 (1970), and 23 FCC 2d 782, 19 RR 2d 228 (1970), respectively.

2. On March 23, 1971, Administrative Law Judge Basil P. Cooper released his Initial Decision, FCC 71D–12, wherein he determined that Voice of Reason had not participated in an unauthorized transfer of control of Station KICM. The Presiding Judge concluded, however, that a grant of the Voice of Reason application would not serve the public interest for the applicant had failed to establish its financial qualifications. The *ex parte*, misrepresentation and Rule 1.65 issues were similarly resolved unfavorably to the applicant. The proceeding is now before the Review Board on exceptions filed by Voice of Reason and the Broadcast Bureau. The Board has reviewed the Initial Decision in light of the record, the exceptions, the Bureau's brief in support of exceptions, and the arguments of the parties before a panel of the Board on May 2, 1972. For the most part, we find the Examiner's findings under the financial, misrepresentation, Rule 1.65 and *ex parte* issues to be substantially accurate, and except as modified herein and in the attached Appendix, they are adopted. We also agree with the Examiner's conclusions under these issues.

3. The Review Board, however, is in substantial disagreement with the Presiding Judge's resolution of the unauthorized transfer of control issue which was decided favorably to the applicant. Although we believe that the basic findings of the Initial Decision set forth at paras. 11–68 are, in most part, accurate and are adopted except as modified by our rulings in the attached Appendix or by our discussion below, we, nevertheless, agree with the Broadcast Bureau that there are additional facts in this record relating to this unauthorized assumption of control which are not set forth in the basic findings of the Initial Decision. Hence, these additional facts were not accorded any consideration, let alone weight, in the favorable conclusions reached by the Initial Decision. We also agree with the Bureau that the unauthorized transfer of control issue here is not limited to the question of *de jure* control stemming from a contract, written or oral, or an understanding among the parties. Although proof of such a signed contract or of such an understanding would clearly establish the intent of the parties, more importantly here, the unauthorized transfer of control issue turns on the conduct or acts of the parties. Stated another way, this issue turns on the collective effect of all of the various indicants of conduct manifesting facts and circumstances, and the applicant's explanations relating thereto, with respect to the day-to-day operational control of the station during the ten-month period of July 14, 1968, through March 26, 1969.

4. In sum, it is apparent from the foregoing that we deem the failure of the Presiding Judge to consider altogether the collective effect of all of the facts and circumstances in this record, as well as the

[3] The burdens of proceeding with the introduction of evidence and of proof under the financial issue were placed by the Review Board upon Voice of Reason; however, the burden of proceeding with respect to the added character issues rested upon the Broadcast Bureau. By virtue of Section 309(e) of the Communications Act, the burdens of proceeding and of proof under the unauthorized transfer of control issue devolved upon the applicant.

applicant's explanations thereof, a major deficiency of the Initial Decision. We, accordingly, reject the summary findings at paras. 70, 73 and 76 of the Initial Decision; we, likewise, reject paras. 4, 5, 8 and 9 of the conclusions of the Initial Decision. Our findings of fact and conclusions set forth below should be substituted for those which we have rejected above. In short, it is our view that the totality of the evidence here compels a conclusion that there was a premature *de facto* assumption of control by Voice of Reason requiring a denial of the subject application.

5. In view of the complexity of this record concerning this unauthorized transfer of control, of the explanations of the applicant with respect to this evidence, and of the position of the Broadcast Bureau, we believe that our resolution of this issue can best be achieved, in the context of the respective positions of the parties. Hence, the first section of this Decision will deal with a brief description of the posture of this station and of the various individuals involved as of July 1968; it will also deal with the significant events which transpired thereafter, and with the respective positions of the parties concerning these events. We shall then set forth the relevant evidence, and our analysis and conclusions relating to that evidence. In subsequent sections of this Decision, we shall deal with the other substantive issues and with Voice of Reason's legal argument addressed to the nature of this proceeding as a whole.

I. UNAUTHORIZED TRANSFER OF CONTROL ISSUE

6. This issue concerns the relationship of Voice of Reason, its president, the Reverend Bill Beeny, and its vice president, Fred Barton, vis-à-vis Station KICM over the period June 1968 through March 1969.[4] During this period, Norman Broadcasting, that is, Norman, was the licensee of the station. See note 1, *supra*. The lessor of the land on which Station KICM stood, as well as the owner of the physical assets of the station, was the Greater Leasing Company.[5] In June 1968, the controlling interest in Greater Leasing was owned by Soldiers of the Cross, an organization with which churches are associated and of which Rev. Oliver Kenneth Goff is national director. Soldiers of the Cross had derived its interest by a December 23, 1966, transfer from Delmar E. and Donald S. Cooper, brothers and ministers, who were presidents of the Rocky Mountain Bank and the Westland Industrial Bank, respectively. These various individuals and organizations were enmeshed in a tangled web of events over the period in question, the most significant of which, for purposes of this issue, were the following: (a) the preparation, in June of 1968, of a "Lease and Purchase Agreement", which was designed to lease the equipment of Station KICM to Voice of Reason and an "Agreement of Employment", which assigned management of the station to Voice of Reason; (b) a

[4] Barton did not become an officer of Voice of Reason until March 24, 1969. However, he had known Rev. Beeny prior to coming to Station KICM and was hired by Beeny to be that station's manager. See para. 16, *infra*.

[5] In June 1968, Greater Leasing was also the proposed assignee of Station KICM. See BAL–5912, an application for assignment from Norman Broadcasting to Greater Leasing, which the Commission had accepted for filing on October 10, 1966.

July 12, 1968, meeting at the Rocky Mountain Bank between representatives of Norman and Voice of Reason, as independent contractor, at which Voice of Reason borrowed some $60,000, allegedly as escrow money "to go into an escrow account until the FCC acted on the petition [application] to acquire the station"; (c) the introduction of Fred Barton to Station KICM and his activities at the station, as well as his relationship to Beeny and to Norman; and (d) the overall role played by Beeny during the period in question.

7. Voice of Reason takes the general position that no *de jure* transfer of control of Station KICM has occurred. The applicant submits that the aforementioned Lease and Purchase Agreement and Agreement of Employment were expressly subject to Commission approval and did not represent an attempt at premature transfer of control. In any case, Voice of Reason argues, the agreements were never executed. With regard to the loan of some $60,000, which was negotiated on July 12, 1968, at the Rocky Mountain Bank, Voice of Reason contends that the proceeds were intended for an escrow account pending Commission approval of its purchase of Station KICM. However, the applicant contends, the funds were diverted and misapplied to the benefit of various of the individuals and organizations mentioned in para. 3, above. It is the applicant's position that it derived no benefit or consideration from the transactions at the Rocky Mountain Bank and that it has been a wholly innocent victim of such transactions.

8. The Broadcast Bureau, on the other hand, takes the position that Bill Beeny, Voice of Reason's president, was fully aware that his actions were contrary to the provisions of the Communications Act and that his testimony throughout the hearing was lacking in candor. Although the Bureau admits that it was unable to produce in evidence a signed agreement for sale of Station KICM, it contends that in both oral and written testimony several of the principals in this proceeding acknowledged the existence of such a contract. Furthermore, despite Beeny's denial of the existence of a signed agreement, the Bureau argues that several of its hearing exhibits show that Beeny on numerous occasions asserted either that a firm contract existed or that he and Voice of Reason were in managerial control of the station. The Bureau also rejects the applicant's explanation of what transpired at the Rocky Mountain Bank meeting and takes the position that this explanation has been put forth by Beeny in an attempt to obscure his knowing control of Station KICM.

9. In addition to the argument it makes above with respect to *de jure* control, the Bureau also takes the position that there has been a *de facto* transfer of Station KICM. In this regard, the Bureau catalogues no less than 22 facts to show Beeny's actual control. Among the more salient are that Voice of Reason allegedly controlled the use of electricity, A.P. Wire, post office box, program format, sale of broadcast time, promotion of the station, finances, tradeouts, and selection of advertisers. The Bureau further contends that the record shows that Beeny hired Barton as KICM's manager and determined his salary; that the two were in close and frequent contact; and that testimony establishes that whereas Barton made day-to-day operat-

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ing decisions at the station, it was Beeny who was responsible for the more important decisions.

10. It is the general position of Voice of Reason that no *de facto* control passed to it. Specifically, the applicant contends that Barton was hired with the knowledge and approval of Norman and that the record reflects that in several instances, Barton acted in compliance with specific directions from Norman. Voice of Reason also argues that Barton opened the various operating accounts in question on his own initiative and not pursuant to instructions by Beeny. Finally, it is the applicant's view that Beeny was not in control of the station; that Barton testified to that effect; and that the testimony was not rebutted at the hearing. With this broad outline of the parties' positions in mind, we now turn to our analysis of the specific arguments presented and of the evidence.[6]

11. Voice of Reason posits that the money, which it borrowed at the Rocky Mountain Bank on July 12, 1968, was supposed to go into an escrow account pending Commission approval of transfer of the Station KICM license to the applicant, but that the funds were diverted and misapplied, and that Voice of Reason was an innocent victim of the entire transaction. Upon review of the salient facts, it is our view that the applicant's explanation strains credulity and cannot be accepted.[7]

The Rocky Mountain Bank Meeting of July 12, 1968—The Alleged Escrow Account

12. As background to the July 12, 1968, meeting at the Rocky Mountain Bank, the following facts are relevant. On July 11, 1968, Voice of Reason was incorporated as a Colorado not-for-profit organization with the expressed purpose of obtaining a license for Station KICM. Bill Beeny, as president, Jerome J. Duff, as secretary, and Logan N. Cox, as vice president, were the incorporators. The same individuals were the original directors. Beeny, who has been broadcasting on a radio station in St. Louis, Missouri for the last 20 years and whose program is carried by approximately 50 stations, became interested in Station KICM in early June of 1968 through Rev. Goff, who, as indicated above, owned the stock of Greater Leasing Company, lessor of the equipment and land of KICM. Beeny subsequently visited the station twice, inspected the facilities, and observed that financially and operationally the station was in a state of neglect, with the engineer merely playing records and keeping logs. Thereupon, Beeny met and discussed a purchase with Delmar E. and Donald S. Cooper, Francis R. Salazar, who was Norman's attorney, and J. Robert Jensen and

[6] It is the Review Board's overall view that the unauthorized transfer of control issue need be resolved adversely to Voice of Reason only on the ground of a *de facto* transfer. Accordingly, our consideration of the parties' arguments with respect to a *de jure* transfer of control will be reserved for the rulings on exceptions in the attached Appendix, and our discussion of the Lease and Purchase Agreement and the Agreement of Employment will, therefore, be limited to how these agreements reflect on the conduct of Voice of Reason at Station KICM. See para. 18, *infra*.

[7] Although the Presiding Judge resolved the transfer of control issue favorably to the applicant, he did so on grounds other than Voice of Reason's explanation of what went on at the Rocky Mountain Bank. Thus, he did not expressly accept that explanation and, in fact, elsewhere in the Initial Decision, he rejected the applicant's contention that the loan did not represent a valid obligation. See I.D., para. 98.

Leo Van Etten, KICM's station manager and engineer, respectively. Salazar, whom Beeny understood to have Norman's power of attorney, and Donald Cooper expressed to Beeny urgent needs for a manager and for revenue. (Tr. 279–82.)

13. A final meeting between the parties occurred on July 12, 1968, at the Rocky Mountain Bank in Golden, Colorado. Present with Beeny and Duff, were the Cooper brothers and Salazar, who was also chairman of the Board and attorney for the bank. At that meeting, Voice of Reason and Beeny borrowed $60,430.59 from the bank and signed a promissory note therefor, calling for monthly payments of $850.00 over an 8-year term. (Bureau Exh. 18.) As security for the loan, Beeny, *inter alia*, delivered a deed of trust to the Missouri Youth Ranch.[8] (Bureau Exh. 21.) Beeny was then given three cashier's checks in the amounts of $25,000.00, $10,243.10 and $25,187.49, made payable to Voice of Reason and Beeny. He endorsed the checks, and gave them to Delmar Cooper, the bank's president. (Bureau Exh. 6.) Beeny testified that although he was very surprised by this entire procedure and questioned it, it was his understanding that the money was to go into an escrow account to be held pending Commission approval of the purchase of KICM;[9] that no money was to be paid out to anyone; and that, in effect, Voice of Reason received no money from this transaction. (Tr. 378–82.) However, it is our view that in light of the facts and circumstances of this case, Voice of Reason's account of this transaction strains credulity beyond its limit and therefore cannot be accepted.

14. To begin with, the July 12, 1968, minutes of the loan committee of the Rocky Mountain Bank reveal that the proceeds from the $60,430.59 loan were to be distributed in the following manner: (a) $25,000.00 was applied to an unidentified loan made by the Westland Industrial Bank, whose president was Donald S. Cooper;[10] (b) $25,187.49 was used to partially satisfy Note 8047, which was an outstanding obligation of Greater Leasing; and (c) $10,243.10 retired Note 6870, which was an indebtedness of Norman. (Bureau Exh. 8(a).) With respect to the Norman note, the record further reflects that on July 15, 1968, Note 6870 was assigned for $10,243.10 to Voice of Reason who, in turn, assigned that note, on the same day and for the same amount, to Soldiers of the Cross. (Bureau Exh. 4.) Beeny denied knowledge of this transaction, albeit he conceded that the signature on the note "resembles mine." (Tr. 185–87; 384.) On the other hand, Kenneth Goff, national director of Soldiers of the Cross, stated that his organization received the note for termination of its interest

[8] The Missouri Youth Ranch is a tract of land in Warren County, Missouri, which had been conveyed to Voice of Reason by deed of trust on July 10, 1968, from the Gospel Revival Hour. The latter is a Missouri not-for-profit corporation of which Beeny is president. See para. 37, *infra*.

[9] Beeny further stated that he and Duff had signed escrow opening account cards and, thereupon, gave the cards and the three endorsed cashier's checks to Delmar Cooper. (Tr. 381.) No escrow agreement or other indicia of this alleged account were retained by Beeny. (Tr. 522.)

[10] An investigation by the Federal Deposit Insurance Corporation (FDIC) revealed that the $25,000 check satisfied a loan which that bank had extended to Soldiers of the Cross. (Voice of Reason Exh. 13.)

in Greater Leasing when Goff realized that it would not acquire KICM (Tr. 462–63).[11] See note 5, *supra*.

15. Beyond this, and more important, Beeny's "escrow" explanation is contradicted by numerous facts of record. His claimed innocence is inconsistent with his business experience. Beeny's sophistication as a businessman is evidenced by the fact that he does broadcast over approximately 50 radio stations (see para. 12, *supra*); that he owns and operate his own advertising agency which supplies various broadcast stations with religious accounts (see para. 17, *infra*); that he is or has been president of various organizations that own substantial real and personal property and has been involved in the transfer of such properties (see para. 37, *infra*); and that he has been a party to other business dealings in the past. With his background, it is difficult to accept Beeny's claim that he was an innocent victim of the transaction that took place at the Rocky Mountain Bank. It is even more difficult to comprehend when it is noted that Beeny's local attorney, Duff, was present with him at the bank. Indeed, it is our view that any reasonable person, let alone experienced businessmen like Beeny and his attorney, Duff, would have immediately questioned the transaction, or at the least, they would have restrictively endorsed the checks. This was not done. Accordingly, it may reasonably be concluded that Beeny knew—or should have known—that the checks were not being placed in escrow, and were, therefore, to be used for other purposes. Finally, it is significant to point out that the aforementioned Lease and Purchase Agreement contained a provision obligating the lessee to deposit $20,000 in escrow with the Rocky Mountain Bank as a guarantee of compliance with the terms of the Agreement. Thus, Beeny cannot claim to be ignorant as to the nature of escrow arrangements. Considering this, the fact that neither escrow account opening cards, which allegedly were signed, nor an escrow agreement for the $60,430.59 note were produced in evidence takes on added importance.[12] In view of the foregoing circumstances, Voice of Reason's professed victimization must be accorded no weight.[13]

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[11] Soldiers of the Cross subsequently brought suit against Norman on the Note 6870 which had been assigned to Voice of Reason, who, in turn, assigned the note in the amount of $10,243.10 to Soldiers of the Cross. Goff, as national director of Soldiers of the Cross, claimed "holder in due course" status. (Bureau Exh. 11.) In addition, the FDIC, the receiver in bankruptcy of the Rocky Mountain Bank, sought recovery in the District Court of Denver, Colorado (Civil Action No. C 12333) against Beeny and Voice of Reason for the outstanding balance of the $60,430.59 loan. At oral argument on May 2, 1972, before the Review Board, counsel for the applicant disclosed for the first time that a judgment in favor of the FDIC had been entered by the court on January 20, 1972. In its judgment, which the Review Board will officially note, the District Court concluded, *inter alia*, that it was at the "instigation and request" of the defendants that the cashier's checks endorsed at the bank were disbursed as they were, and that the defendants "had knowledge or [were] charged with knowledge, both professionally and actually" that the proceeds would be disbursed as they were. (Findings of Fact and Conclusions of Law, 6 and 7.) Counsel has not informed the Board of any subsequent action in the FDIC proceeding.

[12] In the action instituted by the FDIC (see note 11, *supra*), the state court also concluded that the defendants had failed to show that an escrow account was to be established and that Voice of Reason's subsequent payments on the note estopped its claims as to the note's validity. (Findings and Conclusions, 10 and 11.)

[13] The Presiding Judge believed generally that Voice of Reason's troubles primarily stemmed from its failure to understand Commission rules and procedures and its failure to obtain or adhere to advice of specialized communications counsel. See I.D., conclusions, paras. 4–7. We strongly disagree. Had the Presiding Judge given fuller consideration to the facts as we have found above, he might more properly have concluded that the applicant's profession of ignorance and innocence is unconvincing. Cf. *Milton Broadcasting Company*, 34 FCC 2d 1036, 24 RR 2d 369 (1972); and *Medford Broadcasters, Inc. (KDOV)*, 34 FCC 2d 989, 24 RR 2d 359 (1972).

16. In a related argument, Voice of Reason claims that there was no consideration received by it for execution of the $60,430.59 note, except for the transfer of Station KICM upon subsequent approval by the Commission.[14] However, it is our view that the applicant received day-to-day control of the station as consideration and that it thereafter exercised that control through its chosen representative, Fred Barton, KICM's general manager. As noted, operations and the station's condition generally were in a sad state of affairs at the time Beeny became interested in purchasing Station KICM. The licensee—Norman—was not at the station and, other than the fact that the engineer played records and kept logs, the station was, in effect, shut down. In response to the situation, Beeny hired a former associate, Fred Barton, to manage the station, and Barton arrived to begin serving as KICM general manager just two days after the July 12, 1968 meeting at the Rocky Mountain Bank involving the $60,000 transaction. With respect to Barton's entry on the scene, it is to be noted that it was Beeny who fixed Barton's salary at $200 a week, paid it for the first week, and determined that thereafter Barton's salary would be met out of station revenues.[15] In addition to paying the cost of relocating Barton's family in Golden, Beeny also gave Barton $1,000 as prepayment for his religious program which he wanted Station KICM to begin broadcasting. Voice of Reason contends that Barton assumed his managerial role with the knowledge and approval of Norman and that Beeny's payments to Barton for moving expenses and salary merely represented reimbursable advances or advance payments for broadcast time. However, it is clear that Barton never met or communicated with Norman before coming to Golden and did not meet him until approximately eight weeks after he began serving as Station KICM's general manager.[16] (Tr. 161–63.) Barton testified that sometime after this meeting, he signed a contract with Norman, which outlined his duties as general manager. While he could not recall who prepared the document or who gave it to him, Barton remembered sending all copies of the purported contract to Salazar. Barton never saw the document thereafter and did not know whether Norman later signed it. (Tr. 251–53.) Voice of Reason did not produce a copy of the purported contract in evidence. Finally, there is no evidence in the record of any agreement between Beeny and Norman which would call for so-called "advances" to Barton for moving expenses and salary.

17. Immediately after his arrival in Golden, Colorado on July 14, 1968, Barton changed Station KICM's all-music format to a religious programming format and added a 15-minute news program.[17] Within the next few days, Salazar informed Barton that "George Norman doesn't want a religious station there." (Tr. 128.) Barton then replaced

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[14] At Finding and Conclusion 4, the state court concluded that the three cashier's checks were the consideration for the Voice of Reason note. See note 11, *supra*.

[15] In addition, Beeny guaranteed Barton, his proposed station manager, 5% of the station's gross income after the Commission granted the assignment application and approved Voice of Reason as the licensee of Station KICM.

[16] The record is extremely limited with respect to the events that occurred at this meeting; however, it appears that Barton presented Norman with a number of the station's bills and that the latter disposed of them, stating that they had been satisfied. (Tr. 129–30.)

[17] Beeny had earlier advised Salazar and Donald Cooper that he believed a religious format could solve Station KICM's financial problems (Tr. 282–83). See para. 12, *supra*.

the afternoon programming with classic and pop music; however, he kept the morning religious programming because that was bringing in the revenue (Tr. 129, 247, 258–59), and at no time was there a return to the status quo ante of the all-music format. In this connection, it is significant to note that it is in this narrow context that the Presiding Judge concluded that this single incident of Norman's voice demonstrated that no control had passed from the licensee to Voice of Reason because it established that Norman asserted his authority soon after Barton arrived. Although we believe some weight must necessarily be attached to this incident of Norman's voice which indicates that at this particular moment in time Norman did assert his authority, this single incident is outweighed by the numerous other incidents which establish that Beeny, through Barton, participated in the day-to-day operation of the station for the entire 10-month period involving the unauthorized assumption of control.[18] The record is replete with examples of other changes that Barton made at the station. For instance, Barton changed the telephone and gas and electric accounts from KICM to Voice of Reason. An A.P. news wire was leased and a post office box rented, both under the name of Voice of Reason. Barton also opened a bank account at the Rocky Mountain Bank under the heading "KICM Broadcasting, Voice of Reason". Only Barton had authority to draw upon this account through which all expenditures and receipts for Station KICM were handled. (Tr. 131–32, 176–77.) A secretary was hired and her salary was determined by Barton. Barton arranged for various tradeouts, drew up new contract forms for the station, and handled the advertising contracts with the national advertisers (mostly, religious accounts), which Beeny and his advertising agency had selected on behalf of Station KICM.[19] In most cases, advance payments for these broadcasts were deposited in the operating account; however, with respect to the Kathryn Kuhlman account, her check for $7,600 was sent directly to Beeny. (Tr. 194–95.)

18. To counter the impact of this evidence, Voice of Reason contends that Barton opened these various operating accounts on his own initiative and not pursuant to any directives from Beeny, and that the opening of such accounts did not constitute an assumption of control. In our view, this explanation cannot be accepted at face value. For, it is striking to note the degree to which Barton's actions conformed to the Agreement of Employment which, as previously noted, was designed to give Voice of Reason managerial control of Station KICM. (Bureau Exh. 16.) For example, under the terms of this

[18] The Review Board is required to study the Presiding Judge's reasoning and to weigh the factors supporting and contradicting his conclusion; however, we are entrusted with the responsibility to draw our own inferences and to reach our own ultimate conclusions. See *Lorain Journal Company* v. *FCC*, 122 U.S. App. D.C. 127, 351 F. 2d 824, 5 RR 2d 2111 (1965), *cert. denied* 383 U.S. 967 (1966). Also see *Milton Broadcasting Company, supra*, 34 FCC 2d at 1047–48, 24 RR at 383–84; and *Medford Broadcasters, Inc. (KDOV), supra*, 34 FCC 2d at 993, 24 RR 2d at 365.

[19] In a departure from its usual practice, Beeny's agency did not take its customary percentage for supplying these accounts. (Tr. 195, 524–26.) Voice of Reason contends that Beeny's advertising agency was not specifically established for purposes of Station KICM, but serves numerous stations. Though true, this distinction is without significance. The importance of the evidence is that it was Beeny, rather than the licensee, who was largely responsible for bringing advertising and revenue into the station. See I.D., para. 72. *Cf. WLOX Broadcasting Co.* v. *FCC*, 104 U.S. App. D.C. 194, 260 F. 2d 712, 17 RR 2120 (1958); *Heitmyer* v. *FCC*, 68 D.C. App. 180, 188, 95 F. 2d 91, 99 (1937).

agreement, Voice of Reason assumed liability for "all public service, telephone and water billing" and was required to notify the various utilities of this fact. In addition, Voice of Reason became responsible not only for the station's contracts with ASCAP and BMI and its contracts "for radio advertising and for promotion", but also for providing "all necessary personnel, equipment, funds, operating capital and management". Moreover, Voice of Reason's contention that Barton acted independently in opening the accounts, likewise, cannot be accepted at face value without regard to the other facts of record relating to the $60,000 transaction and to the hiring of Barton by Beeny—not Norman. Moreover, this record establishes a continuing close association between Barton and Beeny and the absence of such ties between Barton and Norman. Specifically, Barton and Beeny were in frequent telephone contact. If there were a pressing matter. Barton had to speak to Beeny about, he would so indicate by means of a code the two had worked out. (Tr. 180–82.) The existence of such an arrangement—which was not denied by Barton or Beeny—clearly suggests a conscious effort to conceal the existence of a Beeny-Barton dialogue. Barton's testimony that Beeny did not have any day-to-day role at the station and that if anyone gave him instructions, it was Salazar, Norman's attorney, was directly contradicted by Paul Diener, a former Station KICM employee who had been hired by Barton and who worked at the station as an announcer, salesman and program director from September 1968 to September 1969.[20] As "second man in charge", Diener stated that during his period of employment with Station KICM, he knew of only two instances where Barton spoke either to Salazar or to another representative of Norman. In contrast, in response to a question as to who was running or controlling the station during his time there, Diener testified that "* * * on a day-to-day basis, Fred Barton ran the station. However, any decision that had to be made concerning bills and getting money and that sort of thing, the call was made to St. Louis to Dr. Beeny." (Tr. 587.) Illustrative of Beeny's role in making major decisions, Diener related that Barton had disallowed an advertising account he negotiated with Coors Brewery, the largest business in Golden, allegedly since it would not be compatible with the station's morning religious format. When Diener protested, however, Barton informed him that "I have to

[20] In its exceptions, Voice of Reason claims that Barton's testimony of Beeny's lack of involvement in station affairs is uncontested. However, numerous written exhibits, as well as the above oral testimony, show that this simply is not so. The Presiding Judge did not evaluate or rely upon Diener's testimony, and Voice of Reason submits that this testimony was disregarded because Diener acknowledged that he, in association with other individuals, is interested in applying for Station KICM should it become available. However, Diener's testimony, as indicated, is supported by other evidence; nothing in his testimony suggests it is unreliable; and the Presiding Judge made no adverse demeanor findings with respect to this witness. In fact, Barton himself testified that Diener was fully aware of the former's role in day-to-day management. (Tr. 272–73.) In these circumstances, the Review Board believes that it is unreasonable to reject Diener's testimony because of his interest in applying for this frequency. For it is clear that Diener's testimony in major respects is not refuted, and as a matter of fact, corroborates our conclusion which has been based upon independent evidence. *Cf. Blue Ridge Mountain Broadcasting Co., Inc.*, 36 FCC 1348 (1964), remanded on other grounds FCC 64–898, released October 1, 1964, new Decision 37 FCC 791, 4 RR 2d 1 (1965), affirmed *sub nom. Gordon County Broadcasting Company* v. *FCC*, 352 F.2d 729, 6 RR 2d 2004 (1965); *The Prattville Broadcasting Company*, 5 FCC 2d 601, 8 RR 2d 1096 (1966); *Miami Broadcasting Corporation*, 19 FCC 2d 651, 17 RR 2d 367 (1969).

check"; subsequently, Barton told Diener that he had spoken to Beeny "and was told no". (Tr. 585–87.) The record reflects that Beeny's church is opposed to drinking.[21] (Tr. 543.)

19. In this connection, we are constrained to point out that there is no rule or principle of law which requires us to accept Voice of Reason's extraordinary explanations, particularly when, as here, there is evidence which contradicts these explanations, and the totality of other evidence (*i.e.*, the transaction with respect to the $60,000 alleged loan, hiring of Barton, Barton's and Beeny's activities and conduct in relationship to the station, etc.) constitutes stringent proof of facts and circumstances which support the charge of unauthorized transfer of control. Moreover, we note that on numerous occasions, Beeny represented that he was, in fact, in control of the station and, obviously, his ultimate goal was Commission recognition or authorization of Voice of Reason's control.[22] It also seems apparent that Norman had virtually abandoned the station. Further, the facts of record make clear that Voice of Reason through Beeny, its president, and Barton, the station's functioning manager, controlled KICM's advertising accounts, format, commercial policy, trade-outs, promotions, bank account, news wire, mailing address and electricity.[23]

20. To complete our statement of the relevant facts as well as to treat Voice of Reason's final contentions, the following is pertinent. On October 2, 1968, in response to a Commission inquiry of September 27th, Norman informed the Commission that he never entered into a contract with Beeny to sell Station KICM.[24] (Bureau Exhs. 27, 28.) It was at about this time that a Mr. S. H. Patterson arrived at the station. Barton learned from Salazar that Patterson was interested in purchasing the station and he was instructed to cooperate with Patterson.[25] (Tr. 145.) Voice of Reason relies upon this fact to support its contention that Norman was at all times in control of Station KICM. Though it may be argued that Barton's compliance would appear incongruous if he and Beeny were in control, it is interesting

[21] In addition, Barton stated at the hearing that while he never requested financial assistance from Beeny in meeting Station KICM's obligations, he was confident that if the need arose, "it would have been there." (Tr. 219.)

[22] Beeny's references to being in control and/or self-admonitions about keeping up appearances are diluted in the applicant's view, by the "context" in which they were made. However, examination of the Bureau's exhibits clearly reveals that Beeny repeatedly asserted that he and Voice of Reason were in a proprietary position. Further treatment of this point, including Beeny's references to the existence of a contract transferring control to Voice of Reason will be treated in the Appendix under rulings on exceptions relating to the unauthorized acquisition of *de jure* control.

[23] In this regard, it is interesting to note that during the period following April 25, 1969, when Voice of Reason was in legitimate interim control of KICM, it had the same manager, staff, format, post office box, contract forms, telephone, power and bank accounts.

[24] Voice of Reason relies on its Exhs. 1–7, which contain correspondence between Norman and Barton designed to show that the latter was acting pursuant to the former's instructions. However, the Commission, in denying reconsideration of the designation Order herein, stated that "there is some doubt as to the probative worth of the correspondence * * *" because the letters were written at a time when Norman was seeking to convince the Commission that there was no contract with Voice of Reason and no transfer of control. See note 1, *supra*. Voice of Reason introduced no evidence at this hearing which would dispel the original impression the Commission had of this correspondence, and our examination of the text of the letters, as well as their timing, makes clear that no reliance can be placed on them to establish that Beeny was not in control of the station.

[25] While his recollection was a "little fuzzy", Barton remembered having later been contacted by Norman, who also told him to cooperate in every way with Patterson. (Tr. 145.)

to note that upon learning of Patterson's arrival, Barton directly notified Beeny, who thereupon attempted remedial action. Beeny ceased soliciting advertising for the station; obtained a moratorium on his note payments from the Rocky Mountain Bank; and, on November 19, 1968, informed the Commission of the lease-purchase and employment agreements and Norman's repudiation thereof to Voice of Reason's detriment.[26] (Tr. 569; Bureau Exh. 36.) Beeny further discussed with attorneys the possibility of bringing criminal fraud charges and a civil suit against the Rocky Mountain Bank, Greater Leasing, and their principals. (Tr. 327.)

21. On December 9, 1968, Voice of Reason through its attorney also drew up a "Memorandum of Understanding" designed to sever its relationship with Station KICM. In the Memorandum, Voice of Reason demanded a sum of $6,791.00 in settlement of expenditures advanced for operation, promotion, employee salaries, etc., and *release of Barton from any liability arising out of his position at KICM.*[27] (Bureau Exh. 24.) Beeny then wrote to Salazar, stating that "[o]ur contract to purchase KICM" had been broken and demanding either a new contract or full reimbursement of expenses. If neither was forthcoming, the letter stated, Voice of Reason would cease operation of Station KICM, Barton would terminate his employment, and all accounts brought in by Beeny would leave. (Bureau Exh. 30.) A telegram of like import was sent by Beeny to a principal of either the Rocky Mountain Bank or Greater Leasing. (Bureau Exh. 34; Tr. 537.) On February 17, 1969, Beeny received a 6-month note in the amount of $6,791.00 signed by Donald Cooper and Kenneth Goff. (Bureau Exhs. 24, 32.)

22. On March 26, 1969, Norman called Barton and ordered him to discontinue operation and, on the same date, Norman surrendered his license to the Commission. However, we do not consider these acts by Norman as evidencing his control over the station in light of the fact that the Commission had designated Norman's license renewal application for hearing scheduled to commence just six days later on April 1, 1969. Apparently, Norman preferred to surrender his license rather than proceed to hearing. And, of course, Barton and Beeny could not continue operation of the station after Norman had so acted. Moreover, it is the Board's view that this record convincingly establishes that during the 10-month period in question, Norman had virtually abandoned the day-to-day operation of this station to Barton and Beeny, and that they had assumed premature day-to-day control of

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[26] Despite Voice of Reason's escrow account explanation and argument that no loan was ever actually made to it, we note that it was only upon Patterson's arrival at the station that monthly $850 payments ceased. Barton made the last payment on November 4, 1968. (Bureau Exh. 6.)

[27] This fact is particularly significant in that it reinforces our earlier conclusions regarding the close association between Beeny and Barton. As found at para. 16, *supra*, Beeny recommended and hired Barton as Station KICM's manager; determined his salary and advanced it initially; and guaranteed him an eventual share in station revenues. In light of these facts, Voice of Reason's insistence that Barton be released from any liability arising from his role at Station KICM confirms the Barton-Beeny relationship; and it further demonstrates that Barton was much more than an employee of Station KICM, who looked to Beeny, rather than the licensee, for direction and, ultimately, for protection from liability.

the station.[28] *Cf. Edina Corp.*, 4 FCC 2d 36, 7 RR 2d 767, review denied FCC 66–946, released November 4, 1966, affirmed *sub nom. Norseman Broadcasting Corp.* v. *FCC*, 12 RR 2d 2007 (D.C. Cir. 1968); and *WDUL Television Corp.* (*WHYZ–TV*), 33 FCC 149, 22 RR 545 (1962), modified in other respects, 33 FCC 853, 22 RR 546–1. It is also noteworthy that the Presiding Judge found that Barton took steps at Station KICM to keep Norman's hands "out of the till." See I.D., paras. 52, 75. If Norman were truly in control, as asserted by Voice of Reason, one might reasonably ask why any steps whatever were considered to accomplish this end. The simple answer is that, in fact, Norman had already relinquished *de facto* control of Station KICM to Beeny and his representative, Barton.[29] It is the conclusion of the Review Board, in light of all the facts and circumstances of this case, that the unauthorized transfer of control issue must be resolved adversely to Voice of Reason and that the Voice of Reason application should be denied.

II. RELATED LEGAL ARGUMENTS

23. At different points in the course of this proceeding, Voice of Reason has made certain arguments which relate to the conduct or nature of the proceeding as a whole, rather than to the merits of particular issues. As such, we believe that this is the appropriate point to deal with them. Basically, Voice of Reason's argument are three. First, the applicant contends that the Commission was aware of the facts relating to the unauthorized transfer of control issue at the time it granted the applicant special temporary operating authority and was consequently estopped by its action from designating the proceeding for hearing on that issue. See, *e.g.*, Tr. 17–19; and Voice of Reason's petition for reconsideration, filed December 22, 1969. Second, Voice of Reason makes certain arguments as to the proper allocation of the evidentiary burdens under the transfer of control issue and the respective roles of the Broadcast Bureau and the applicant in meeting their burdens. Third, the applicant claims that it was advised at the hearing that only the transfer of control issue would be tried and that the other issues, which were subsequently added, took it by surprise. See, *e.g.*, Tr. 68–70.

24. Turning to the first argument, it is apparent that the Broadcast Bureau was conducting an on-going investigation of George I. Norman, Jr., in connection with his 1962 renewal application, which was designated for hearing on October 9, 1963, and was thereby incidentally aware of many facts relating to the involvement of Bill

[28] In determining where control of a licensee lies, the Commission has traditionally looked beyond mere legal title since Section 310(b) of the Communications Act contemplates every form of control, actual or legal, direct or indirect, negative or affirmative. *E.g. Lorain Journal Company* v. *FCC, supra.* The passage of control may be actual, rather than legal, by virtue of the circumstances presented. As the Commission has stated, "a realistic definition of the term control includes any act which vests in a new entity or individual the right to determine the manner of operating the licensee and determining the policy that the licensee will pursue". *WHDH, Inc.*, 17 FCC 2d 856, 863, 16 RR 2d 185, 194–95 (1969).

[29] Under the terms of the Employment Agreement, the right to "any and all income" during the management term accrued to Voice of Reason, subject to its obligation to maintain the solvency of Station KICM.

Beeny and Voice of Reason in an unauthorized transfer of control of Station KICM. Even if most of the facts relating to unauthorized transfer to Voice of Reason were ascertained at the time of the original 90-day grant,[30] the Commission was not thereby estopped from taking its subsequent action. In *National Broadcasting Co., Inc.*, 37 FCC 427, 2 RR 2d 921 (1964), the Commission ordered NBC to return certain Philadelphia broadcast licenses to Westinghouse Broadcasting Company, notwithstanding the Commission's earlier approval of the exchange of Westinghouse Stations WRCV–TV and WRCV(AM), Philadelphia, for NBC's Cleveland AM and TV stations. See 15 RR 374 (1965). The exchange was ordered rescinded on the basis of a finding that the exchange which was approved without hearing, had been effected by the coercive use of NBC's power to grant or deny network affiliation to Westinghouse. The Commission ruled that it was not estopped from taking this action because: (1) NBC had not relied on any Commission pronouncement as authority to engage in the misconduct, but rather relied on Commission action to authorize the exchange *after* the misconduct had occurred; and (2) the 1955 grant had not been made upon a full hearing record or pursuant to an opinion expressing the reason for the Commission's action and defining the nature of the adjudication made.

25. Similarly, in the case at hand, it cannot be said that the Commission's action in granting special temporary operation in any way condoned Voice of Reason's misconduct, which had occurred prior to the temporary grants. In addition, whatever information the Commission had before it at the time of the original grant, the Review Board and the Commission now for the first time have the full compilation of facts on a hearing record. The initial grant was indicative only of a Commission finding that "extraordinary circumstances" pursuant to Section 309(f) of the Act existed to allow a 90-day operation.[31] As the Commission said in denying reconsideration of its designation Order: "Contrary to the contentions of Voice of Reason, the orders granting interim authority for the operation of Station KICM made no findings concerning the qualifications of Voice of Reason to be a licensee."[32] FCC 70–144, released February 13, 1970. *Cf. Folkways Broadcasting Co., Inc.*, v. *FCC*, —— U.S. App. D.C. 2d ——, 379 F. 2d 447, 9 RR 2d 2079 (1967); and *Nick J. Chaconas*, 35 FCC 2d 698, 702, 24 RR 2d 811, 816 (1972).

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[30] In its opposition to Voice of Reason's petition for reconsideration of the designation Order, the Bureau indicated that when the Commission granted special temporary authority, it did so without full knowledge of Voice of Reason's involvement with Norman. In any event, Voice of Reason did not specify either at the hearing or in its pleadings what information was in the Commission's files (other than to say it submitted all known details) or the files to which it refers.

[31] In granting 90-day authority, the Commission specifically relied upon *Community Radio of Sarasota Springs, New York, Inc.*, FCC 64–234, 2 RR 2d 290, wherein similar authority had also been granted on a showing of "extraordinary circumstances". In addition, the Commission subsequently stated in that case that no benefit in the upcoming comparative hearing would accrue to the interim operator as a result of the temporary operation. FCC 64–584, 2 RR 2d 1099.

[32] On March 16, 1970, Voice of Reason filed in the D.C. Court of Appeals a motion to stay further Commission proceedings and a motion for a hearing, as well as a Section 402(b) appeal from the Commission's designation Order. (Case No. 24,023) On March 23, 1970, the Commission opposed the motion to stay and for hearing and moved to dismiss the appeal. On May 26, 1970, the court entered an Order denying Voice of Reason's motion and granting the Commission's motion to dismiss. See note 2, *supra*.

26. Turning to Voice of Reason's argument regarding the evidentiary burdens, applicant's counsel contended at oral argument that the record under the unauthorized transfer of control issue contained gaps and that, in essence, it was the Bureau's obligation to fill them. Counsel relied upon language in *Office of Communication of the United Church of Christ* v. *FCC*, —— U.S. App. D.C. ——, 425 F. 2d 543, 16 RR 2d 2095 (1969), in support of its position. To begin with, the Commission, in *D and E Broadcasting Co.*, 1 FCC 2d 78, 5 RR 2d 475 (1965), set forth its general policy on burden of proof and proceeding questions. The Commission pointed out that where issues involving serious misconduct are designated without any petition having been filed, such as in this case, the Communications Act requires that both burdens be placed on the applicant. However, "as a matter of fairness", the Commission held that the Bureau should, either in a bill of particulars or by the introduction of evidence at the hearing, "make an initial presentation which will serve the limited purpose of delineating the facts in issue and of informing the applicant of the precise factual questions it will be required to resolve".

27. It is clear that the Bureau sustained its burden herein. It introduced 54 hearing exhibits, many of which were addressed particularly to the transfer of control issue. It also made every effort at hearing to raise questions relating to the exhibits and otherwise to fill out the hearing record. Voice of Reason's reliance on *United Church of Christ*, *supra*, is unavailing. In that case, a license renewal proceeding involving fairness and programming issues, the court held that the complaining intervenors were erroneously given the burden of proof instead of the licensee. This error, said the court, resulted in rejection of testimonial evidence offered by the intervenors as mere "allegations". In discussing the administrative conduct in this case, the court said: "Once again we see the pervasiveness of the original error in confusing mere 'allegations' and testimonial evidence—evidence which if not contradicted by the licensee's evidence, or on its face incredible, was entitled to carry the day in terms of establishing the point to which it was directed". 425 F. 2d at 549, 16 RR 2d at 2105. Counsel for Voice of Reason relied upon this passage at oral argument; however, any reliance thereon is thoroughly misplaced, for as the court emphasized in the above-cited decision, the intervenor's proper burden was "the burden of going forward with evidence in the first instance". 425 F. 2d at 546, 16 RR 2d at 2100. With the proper allocation of burdens in mind—the Bureau having the initial burden of proceeding, and Voice of Reason substituted for "the licensee" above—the failure to rebut evidence would inure to the detriment of the applicant, rather than the Bureau.

28. There is no question that the burden of proof rested upon Voice of Reason. Any gaps in the record were the applicant's to fill and the uncertainties were for the applicant to resolve: "As a rule, one who has the burden of proof must produce evidence which removes the issue or fact as to which the burden relates from the realm of conjecture and establishes its truth with reasonable certainty. Ordinarily, the requirement is satisfied by a preponderance of evidence." *Cyc Fed Proc* (3rd

Ed) § 26.296. "The burden of proof must be satisfied in order to sustain a decision or finding in favor of the party on which the burden rests". *Cyc Fed Proc* (3rd Ed) § 26.298. See generally Wigmore, *Evidence* (3rd Ed) § 2485. The risk of non-persuasion was upon the applicant, not upon the Bureau.[33] We believe it is also noteworthy that in response to questioning by counsel for Voice of Reason, Broadcast Bureau counsel undertook to explain the proper allocation of evidentiary burdens with respect to the unauthorized transfer of control issue (Tr. 42–43), as well as the issues added by the Review Board (Tr. 108–11). In each case, counsel for the applicant acknowledged his understanding of his responsibilities. In light of this conduct, it is difficult to countenance the applicant's alleged confusion at this time.

29. Voice of Reason's final contention may be readily dealt with. The applicant relies on the fact that at an early prehearing conference, it was informed that it would only have to establish that no premature transfer of control of Station KICM took place in order to establish its qualifications to receive a grant. At that point the statement was true because the Bureau had not yet petitioned the Board to enlarge the issues and, of course, the Board had not yet acted. However, as the Presiding Judge explained to applicant's counsel (Tr. 68–70), such enlargement was in no way unusual or unprecedented. The Review Board's jurisdiction to enlarge hearing issues upon timely filing of petitions is basic, finds its genesis in the Commission's Rules, and was not exercised in this proceeding in anything other than the ordinary and customary manner. See Rules 0.361 and 1.229. Accordingly, we do not believe Voice of Reason was treated unfairly in this proceeding and we reject its claim of prejudice.

III. FINANCIAL ISSUE

30. As we previously indicated, the Presiding Judge's findings are substantially correct under this and the remaining issues, and any additions or changes in our findings are supplemental only. In order to finance its proposal, which sets forth total construction and first-year operating expenses of $81,000, Voice of Reason states that it will sell or encumber any or all of the assets listed on the February 28, 1969, balance sheet, which was submitted with its application. (Voice of Reason Exhs. 27, 29.) At the hearing, however, Voice of Reason submitted a balance sheet, dated September 10, 1970, to meet its costs under the same plan of financing.[34]

31. In its September 10, 1970, balance sheet, Voice of Reason lists current assets of $30,888, consisting of cash and accounts receivable. It also lists fixed assets of $377,960, consisting of various real and personal property. All the listed current and fixed assets, however, are

[33] We point out that nothing in the reported cases under Section 309(f) of the Act would indicate that a prior grant of special temporary authority in any way changes the nature of the proceeding or affects the allocation of evidentiary burdens under subsequently specified issues.

[34] A good deal of confusion exists as to Voice of Reason's costs. The Presiding Judge, relying upon figures presented in Voice of Reason's application, estimated the applicant's costs at $91,000, as follows: legal and engineering—$6,000; equipment—$10,000; operating costs—$75,000. In the Board's view, however, the applicant's costs actually total $113,000. See Ruling on Exception No. 18, *infra*.

owned by Freedom Baptist Temple.[35] Freedom Baptist Temple is an unincorporated religious organization and church in St. Louis, Missouri. Beeny is pastor and one of three trustees of Freedom Baptist Temple. Beeny stated that the bulk of Freedom Baptist Temple's funding results from his work as a religious broadcaster and that it could be described as the "parent organization" that founded and backed Voice of Reason. Beeny further testified that Freedom Baptist Temple has pledged all of its assets, if needed, to Voice of Reason for the purpose of purchase or operation of KICM and that such a pledge was contained in the recorded minutes of a church meeting. (Tr. 677–78, 729–30, 768.) However, no adequate documentation of the pledge of assets from Freedom Baptist Temple has been submitted; nor has a balance sheet listing the assets and liabilities of Voice of Reason itself been submitted.

32. In deciding that Voice of Reason was not financially qualified, the Presiding Judge concluded that it was impossible to ascertain from the record either the assets in the name of the applicant or the extent of its legal liabilities.[36] He stated that Voice of Reason had not established that the funds of Freedom Baptist Temple were available to it for construction and operation of the station, and held that the financial stability of the entities was in question because of the frequency of asset transfers between them. The Presiding Judge therefore concluded that the applicant had not established that it had, or could obtain, the necessary funds to construct and operate its facility for one year.

33. It is the position of Voice of Reason that Freedom Baptist Temple's ownership of the assets, upon which the applicant relies, is irrelevant because those assets have reportedly been pledged to the applicant's use in the acquisition and operation of Station KICM. Voice of Reason asserts that there is a commonality of officers and directors between itself and the Freedom Baptist Temple; that Beeny has been president of both organizations; that the funds involved have derived from Beeny's activities as a religious broadcaster; and that the congregation of the Freedom Baptist Temple has approved the pledge of funds. In the applicant's opinion, the listed assets are "under the control of Voice of Reason in every sense".

34. Crucial to the applicant's argument is the existence of the pledge of assets from the Freedom Baptist Temple. However, Voice of Reason has failed to substantiate in any adequate way—*i.e.*, documentary evidence in the form of a copy of the congregation's minutes or a record of the vote—Beeny's obviously self-serving testimony that a pledge was, in fact, made. The instructions to Section III of FCC Form 301 specifically direct an applicant relying on funds to be furnished by

[35] One of the listed fixed assets, the Missouri Youth Ranch, property and building, has had a confusing chain of title, to put it mildly. See Voice of Reason Exhs. 31–32; and I.D., paras. 92, 94–97. However, Voice of Reason states that the property is now owned by Freedom Baptist Temple. (Tr. 283; Bureau Exh. 20.)

[36] Omitted from the liabilities section of the September 10, 1970, balance sheet were the $60,430.59 note, which Beeny had given to the Rocky Mountain Bank, and certain expenses purportedly incurred by Beeny during Voice of Reason's special interim operation of Station KICM. (Tr. 706–08.) In addition, encumbrances on several fixed assets were unreported. (Tr. 687–88; Bureau Exh. 47.)

another person to include, *inter alia*, "* * * (a) [a] description of that which * * * will be furnished * * *; (b) * * * the source or sources thereof; and (c) * * * a verified copy of the agreement by which each person is so obligated * * *" In addition, well-settled Commission precedent holds that the uncorroborated testimony of an applicant as to the availability of loan funds is insufficient to demonstrate such availability.[37] *E.g.*, *Lamar Life Broadcasting Co.*, 26 FCC 2d 112, 20 RR 2d 509 (1970); *Tri-City Broadcasting Co.*, 35 FCC 364, 1 RR 2d 81 (1963). In the Board's view, the same principle must be applied here; and under that principle, no "reasonable assurance" of the availability of the funds in question has been established. Voice of Reason has failed in its efforts to dissipate the confusion as to the availability and ownership of the assets in question. Despite Beeny's testimony, the nature and relationship of Voice of Reason vis-à-vis Freedom Baptist Temple and the applicant's authority to use the assets of the latter organization are still not clear. No documents were introduced to prove the existence, purpose, nature, or rules and regulations of the Freedom Baptist Temple. Although he is the pastor of the Freedom Baptist Temple and at one time president of this organization, Beeny is not thereby in control of its funds. The record, albeit limited in this regard, does reveal that Beeny is only one of the three trustees of the Freedom Baptist Temple, who are charged with business decisions and that sale or pledge of church assets must be approved by vote of the congregation. Indeed, it was the congregation which allegedly approved the pledge to Voice of Reason. Furthermore, and again despite the Bureau's repeated requests, documentary proof that Freedom Baptist Temple has title to various fixed assets on the September 10, 1970, balance sheet was not presented. In light of the facts that Voice of Reason does not own the assets in question, but is nevertheless relying upon them, it is the opinion of the Review Board that such documentation was required. Finally, and again in contravention of the specific instructions contained in Form 301, the applicant has not submitted complete documentation of the financial condition of the Freedom Baptist Temple. The record in this regard is not clear as to whether the September 10, 1970, balance sheet contains a full or partial listing of the assets and liabilities of that organization. Accordingly, the Board must agree with both the Bureau and the Presiding Judge that the applicant has not set forth a clear, complete and accurate picture of its financial condition. In these circumstances, the Review Board concludes that there has been a failure of proof on the applicant's part under the financial issue. See *The Tuscarawas Broadcasting Co.*, 4 FCC 2d 466, 8 RR 2d 1 (1966). Accordingly, this issue must also be resolved adversely to Voice of Reason.

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[37] As noted by the Presiding Judge, neither Beeny's affidavit nor his sworn testimony at the hearing can cure the lack of a written representation, duly executed by the officers, directors or trustees of the Freedom Baptist Temple, that the funds of such entity are or will be available to Voice of Reason for the construction and operation of the proposed station. See I.D., para. 103.

IV. MISREPRESENTATION, RULE 1.65 AND EX PARTE ISSUES

35. As in the preceding section, our comments in this section are by nature supplementary to the Presiding Judge's findings of fact and conclusion that the applicant must be disqualified for failure to favorably resolve these character issues.

A. Misrepresentation and Rule 1.65 Issues

36. The facts herein may be simply stated. The misrepresentation issue relates to the balance sheet, dated February 28, 1969, which was submitted with Voice of Reason's application for a construction permit on April 2, 1969. The balance sheet lists current assets of $48,600, consisting of cash and accounts receivable, fixed assets of $190,100, consisting of real and personal property, and liabilities of $43,400. Of the assets, only the Missouri Youth Ranch was owned at the time by Voice of Reason. All the other fixed assets, as well as the current assets, were owned by Gospel Revival Hour, the not-for-profit Missouri corporation of which Beeny was president. (Tr. 740–42). The liabilities were also those of Gospel Revival Hour.

37. The Gospel Revival Hour was set up for the purpose of dispensing the gospel and working with under-privileged children at the Missouri Youth Ranch. It is not a church with a congregation, but receives its money through contributions derived from Beeny's radio broadcasts and his mailing list. Beeny stated that the Gospel Revival Hour pledged its assets to Voice of Reason and that the minutes of the directors' meetings of the Gospel Revival Hour reflect this pledge. At the time the pledge assertedly was made, the officers and directors of the Gospel Revival Hour were Beeny, Mrs. Delores Estes and Mr. Walter Lipskoch. Beeny testified that the corporation was dissolved sometime in 1969 and its assets transferred to the Freedom Baptist Temple.[38] (Tr. 743–45.)

38. The February 28, 1969, balance sheet did not mention that Gospel Revival Hour owned the assets listed therein. And Beeny testified that the assets listed are only a partial listing of Gospel Revival Hour's assets. (Tr. 745, 749.) Like the September 10, 1970, balance sheet relied upon by the applicant at the hearing, the February 28, 1969, balance sheet reflects neither the $60,430.59 note signed by Voice of Reason on July 12, 1968, nor the deed of trust on the Missouri Youth Ranch, which secured the Rocky Mountain Bank loan. See para. 13, *supra*.

39. On January 31, 1969, the Rocky Mountain Bank collapsed. Subsequently, certain assets of the bank, including the $60,430.59 note signed by Beeny, were transferred to the FDIC for purposes of liquidation. Because of default, the FDIC, on July 30, 1969, brought suit against Beeny and Voice of Reason for the outstanding balance of the note, $58,423.15. See note 11, *supra*. An answer, denying liability on

[38] As the Bureau and the Presiding Judge both note, this dissolution somehow did not obstruct the Gospel Revival Hour from prosecuting a suit on September 10, 1970, to establish its title to the Missouri Youth Ranch, nor from executing a quitclaim deed for that property to the Freedom Baptist Temple on September 16, 1970. (Voice of Reason Exhs. 31–33.)

the part of Voice of Reason, was filed with the District Court in Denver, Colorado on March 3, 1970. (Bureau Exh. 26.) Voice of Reason did not report the existence of this civil suit to the Commission. The applicant's failure to initially disclose the encumbrance on the Missouri Youth Ranch and its failure to apprise the Commission of the FDIC suit formed the bases of the Board's action adding the misrepresentation and Rule 1.65 issues in this proceeding. See 23 FCC 2d 782, 19 RR 2d 288.

40. The Presiding Judge concluded that the February 28, 1969 balance sheet when filed misrepresented Voice of Reason's financial condition to the Commission. Specifically, he found that the greater part of the assets represented to be those of Voice of Reason were actually owned by another legal entity, and that it is not the Commission's function to assume that some other entity will financially assist the applicant. See I.D., para. 119. In his Decision, he also held that the applicant failed to amend its application or the erroneous financial statement contained therein to reflect material and significant changes in its financial qualifications as required by Rule 1.65.

41. In its exceptions addressed to the misrepresentation and Rule 1.65 issues, Voice of Reason renews its claim that the $60,430.59 note was not considered a liability because the loan was never actually made and because the loan proceeds were misapplied. In support thereof, Voice of Reason points out that the FDIC has filed suit against the officers and directors of the Rocky Mountain Bank to recover the amount of the note [39] and had previously filed a proof of loss with the bonding company, claiming recovery by reason of the acts of such officers.[40] The applicant further argues that no Commission regulation and nothing in the application form requires reporting of contingent or doubtful liabilities. With regard to the asserted pledge of assets from the Gospel Revival Hour, Voice of Reason submits that assets may legitimately be transferred from one not-for-profit organization to another and that while the application form requires a statement in explanation of pledges, hypothecations and encumbrances on securities, no similar requirement exists with respect to real estate. Since it did not have to report the note or deed of trust initially, Voice of Reason contends that the Presiding Judge erred in concluding that significant changes had gone unreported.

42. The February 28, 1969, balance sheet which Voice of Reason submitted with the application was the document to which the Commission was obligated to look in order to assess the applicant's financial status. As such, its reliability was crucial. However, many deficiencies in the balance sheet existed. Most glaring was the fact that most of the listed assets were not those of Voice of Reason, but were owned by another entity, the Gospel Revival Hour. The Board's study of the

[39] Voice of Reason attaches a copy of the complaint in this suit to its exceptions and requests official notice thereof. Official notice will be taken of the pleading in question.

[40] As a defense in the suit brought against it by the FDIC, Voice of Reason claimed there was no loss to the plaintiff because of a compromise settlement between the FDIC and the bonding company. At Findings of Fact and Conclusions of Law 9, however, the state court rejected this contention, finding that the settlement was unproportioned and that no part of the amount was designated as the claim evidenced by the $60,430.59 note.

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application, as well as Voice of Reason's financial amendment thereto, reveal no effort made to explain or disclose the fact that the assets were owned by another entity or the relationship, for purposes of this application, between the two entities. Moreover, in neither its application nor its amendment thereto did Voice of Reason indicate that a pledge of assets from one entity to the other existed. Pursuing its own theory that whatever assets Voice of Reason requires are freely available to it through the alleged pledge from the Gospel Revival Hour, the applicant again inadequately supported its position at the hearing. As was the case with the asserted pledge from the Freedom Baptist Temple, the Gospel Revival Hour pledge—its terms, nature, duration—was not adequately documented. Voice of Reason's unsupported argument that these assets are those of the applicant cannot be accepted, and the submission of the February 28, 1969, balance sheet, which contained no reference to the Gospel Revival Hour, cannot be regarded as an insignificant omission.

43. Turning to the face of the balance sheet, even the assets therein listed present an incomplete picture. First of all, Beeny testified that these assets were only a partial listing of the finances of the Gospel Revival Hour. Also, the certificate of title for the Missouri Youth Ranch indicates "delinquent taxes" for the years 1967–1969 and the certificate of title to the land in Warren County indicates that taxes for 1969 "are a lien". In the Board's opinion, the 1967 and 1968 taxes on the Missouri Youth Ranch should have been reported on the balance sheet. The applicant's explanation is not unawareness; rather, it disputes the debts because church property is involved. Once such taxes have been assessed, however, the question of their validity is one of future determination by a court of competent jurisdiction. It is not for the Commission to assess the validity of the obligation, but for the applicant to substantiate that it is not, in fact, a liability. This Voice of Reason has not done. It has introduced no evidence from any state authority that the taxes were improperly listed, and we must therefore assume the contrary. See *Lake Erie Broadcasting Company*, 33 FCC 2d 1009, 23 RR 2d 1223 (1972); *Home Service Broadcasting Corp.*, 23 FCC 2d 914, 19 RR 2d 315 (1970); *Wilkes County Radio*, 10 FCC 2d 175, 11 RR 2d 341 (1967). The same argument applies to the note signed by Beeny on July 12, 1968, at the Rocky Mountain Bank. The applicant's simple denial of the validity of this obligation is not enough, standing alone, to wipe out the debt. Nor, again, is this a matter for whose legal resolution the applicant may properly look to the Commission. The applicant should have listed the disputed debts and indicated its position with respect to those matters. But it did not choose to do so, and the balance sheet it submitted is consequently misleading. See *Martin Lake Broadcasting Company*, 34 FCC 2d 956, 24 RR 2d 301 (1972). Even more glaring is the applicant's failure to indicate on the balance sheet that the Missouri Youth Ranch had been encumbered on July 10, 1968, by the deed of trust securing the loan from the Rocky Mountain Bank. It was upon this basis that the Board added the Rule 1.65 issue initially. The applicant's only arguments have been to deny the validity of the entire underlying transaction and any cor-

responding duty to report either contingent liabilities or encumbrances upon realty. However, it is the Board's opinion that where the applicant has listed and relied upon an asset, it is seriously misleading not to indicate any encumbrance on the asset, even if doubtful. See *Martin Lake Broadcasting Company, supra*; *Horne Industries, Inc.*, 28 FCC 2d 454, 21 RR 2d 851 (1971); *Folkways Broadcasting Co., Inc.*, FCC 71R-63, 21 RR 2d 211; *Louis Vander Plate*, FCC 68R-390, 14 RR 2d 309. Again, the applicant should have at least indicated the existence of the disputed encumbrance on its balance sheet, but it did not choose to do so. Voice of Reason's argument that only encumbrances on personal property must be reported is simply a misreading of the application form and is inconsistent with Commission precedent. *E.g., Phil D. Jackson*, 33 FCC 2d 561, 23 RR 2d 632 (1972); *J. W. Furr (WMBC)*, 10 FCC 2d 357, 11 RR 2d 410 (1967).

44. With respect to the Rule 1.65 issue, the Board believes that the existence of a civil suit, whose resolution adversely to the applicant could well have a significant impact upon the applicant's financial qualifications, is obviously germane to the Commission's deliberations. That Voice of Reason has answered the civil complaint and may be vindicated by the judgment is no defense, for our purposes, to its failure to report the facts in the first instance.[41] The Commission cannot evaluate the applicant's financial condition without full knowledge of all pertinent information. The least the applicant's duties to the Commission require is that it report fully the facts and circumstances surrounding the obligation whose legitimacy it disputes. Voice of Reason's selective submission of data obviously is not in compliance with Rule 1.65. We believe that, in light of its own stance before the Commission, the applicant should have known that the FDIC suit was a significant matter, and that its course of action resulted in keeping from the Commission possibly damaging information concerning its financial qualifications. In these circumstances, however sympathetic one may be to the applicant's claim that it has been defrauded, the applicant's obligation to report completely the data the Commission requires in order to decide is in no wise diminished. In view of the foregoing, the Board concludes that Voice of Reason has misrepresented its financial posture in the balance sheet submitted with its application; that the applicant has not complied with the requirements of Rule 1.65; and that such conduct reflects adversely upon the applicant's fitness to be a Commission licensee.

B. Ex Parte Issue

45. Following the Commission's denial of Voice of Reason's petition for reconsideration of the designation Order, Beeny authored a pamphlet which was mailed to thousands of persons on his mailing list and

[41] In its Report and Order on Rule 1.65, the Commission said the following: "The rule is thus intended to apply (I) where there has been a substantial change and (II) where that substantial change may be significant to the Commission's consideration of an application and determination of the public interest. The information contained in the application itself is definite and the obligation to keep it substantially accurate and complete is akin to the duty of avoiding an initial misrepresentation or lack of candor." FCC 64-1037, 3 RR 2d 1622, 1624. The Commission also emphasized that changes substantially affecting the applicant's financial qualifications must be reported.

distributed at the weekly meetings that he conducted around the country. The pamphlet reads in pertinent part (Bureau Exh. 47):

F.C.C. *Denies* KICM PETITION TO *GO BACK ON THE AIR!* FIGHT MUST BE TAKEN TO INTO U.S. COURT OF APPEALS WE NEED CHRISTIANS TO *JOIN THIS FIGHT BY SENDING YOUR* GIFT TODAY!

On December 17th we filed a petition for reconsideration asking for FCC to put our Christian Radio Station KICM back on the air since there had been no valid reason for ever taking it off . . . . The FCC *DENIED* [our petition;] they are determined to kill off the Christian broadcasting in that area. FCC chairman, Dean Burch also voted to keep us off the air! WE URGE EVERYONE OF YOU TO WRITE HIM A LETTER DEPLORING THIS ACTION. WRITE TO DEAN BURCH, FCC CHAIRMAN, WASHINGTON.

Messages similar or identical to those contained in the pamphlet, had earlier been delivered by Beeny in his radio broadcasts, which are carried by more than fifty stations. These messages were broadcast on a daily basis during November and December of 1969. Letters in response to Beeny's appeals were received at the FCC in "great numbers". (Tr. 827.)

46. The Presiding Judge, after discussing the meaning of the Commission's *ex parte* rules (see I.D., paras. 108–10), held that Voice of Reason and its president had urged numerous members of the public to write *ex parte* letters intended to "pressure" Chairman Dean Burch during the course of this adjudicatory proceeding. Considering the *ex parte* issue together with the other character issues herein (misrepresentation and Rule 1.65), he concluded that Voice of Reason "has failed to establish that it has the qualifications which the Commission requires of a broadcast licensee". See I.D. Conclusions, para. 11.

47. In accordance with Section 409(c) of the Act, the Commission adopted regulations concerning *ex parte* communications which are set forth in Sections 1.1201 to 1.1251 of the Rules.[42] The rules pertinent to this proceeding are, to paraphrase, as follows:

§ 1.1212(b). Written *ex parte* presentations shall not be made by interested persons in restricted proceedings.
§ 1.1203(a). Adjudicative proceedings, such as this one, are restricted proceedings from the time of designation until the time for final review has passed.
§ 1.1201(f). Any communication going to the merits or outcome of any aspect of a restricted proceeding is a presentation.
§ 1.1201(g). Any written presentation, made to decision-making personnel by any other person, which is not served on the parties to the proceediing, is an *ex parte* presentation.
§ 1.1201(e). An interested person is any person having a direct or indirect interest in the outcome of a restricted proceeding, including parties to the restricted proceeding and their agents.
§ 1.1205(a). The Commissioners are decision-making Commission personnel in restricted adjudicative proceedings.
§ 1.1225(a). No person shall solicit or encourage third persons to make any presentation which he is himself prohibited from making.

48. In the Board's view, even a cursory study of the aforenoted rules clearly indicates that Voice of Reason, despite its protestations

[42] The importance with which the Commission regarded these rules is evidenced in the Report and Order in Docket No. 15381. See *In the Matter of Rules Governing Ex Parte Communications In Hearing Proceedings*, 1 FCC 2d 49, 5 RR 2d 1681 (1965). Therein the Commission acknowledged that the right of every person to a decision based on the merits of his case is a touchstone of our society; it is a right ensured by our legal system which provides for a decision on the basis of a record, compiled openly in accordance with evidentiary and procedural safeguards, which afford an opportunity for cross-examination and rebuttal testimony and the equal opportunity for each party to argue his position. 1 FCC 2d at 49–50, 5 RR 2d at 1681–82.

to the contrary, has through its president, solicited *ex parte* presentations to the Commission in violation of Rule 1.1225. Voice of Reason argues that Beeny's over-the-air solicitations occurred immediately after the Commission's order was released terminating Voice of Reason's temporary operation of KICM and that the matter was not a restricted or adjudicatory proceeding at the time. However, in the same order of October 22, 1969 (released October 27), the Commission designated the proceeding for hearing, and once so designated, it was thereafter a restricted proceeding within the meaning of Rule 1.1203 (a). Voice of Reason and its principals were interested in the outcome of this restricted proceeding (see Rule 1.1201(e)); the communication by Beeny related to the outcome or merits of the proceeding, *i.e.*, the fitness of the applicant to be a Commission licensee; and the impermissible communications stemming therefrom were directed to decision-making personnel, namely, the Chairman of the Commission (see Rule 1.1205(a)).[43] Moreover, the presentation of the appeal in a letter which was also designed to elicit financial contributions does not, in our view, "minimize its obvious role as a vehicle for the solicitation of impermissible presentations". *Voice of Reason, Inc. (KICM)*, 22 FCC 2d at 931, 18 RR 2d at 1051. The statement in Beeny's letter, "we urge everyone of you to write him [Dean Burch] a letter deploring this action [denial of the reconsideration petition]", can only be read as a direct appeal for communications to the Chairman by Beeny's listeners protesting the Commission's designation of the Voice of Reason application for hearing. It is thus in contravention of Rule 1.1225. The appeal was not general and public, as Voice of Reason argues, but specifically transmitted to those on Beeny's mailing list and his weekly audiences.[44] The applicant points out that letters received by the Chairman's office in response to Beeny's solicitations are available for inspection in the Commission's files. However, this availability simply reflects the Executive Director's compliance with the procedural guidelines expressed in Rule 1.1241 and in no way excuses the nature of the appeal made by Beeny or the manner of its transmission. Voice of Reason further argues that the *ex parte* rules were not willfully violated; however, the Commission Report and Order, *supra*, makes clear that intent is irrelevant in determining whether a presentation has been made. 1 FCC 2d at 56, 5 RR 2d at 1691. Moreover, Voice of Reason has not established on this record that its principal's repeated violation of the *ex parte* rules was accompanied by inadvertence, good faith or overall innocent intentions; nor can such an inference be readily drawn from the specific acts of Bill Beeny. In short, it is the Board's opinion that the authorship and distribution of the pamphlet contravened both the clear language of the *ex parte* rules, as well as their very important underlying purpose (see note 42, *supra*), and that this issue must also be resolved unfavorably to the applicant.

[43] See *Al G. Stanley (KATO)*, FCC 70–849, 19 RR 2d 1179; *Pacifica Foundation*, 25 FCC 2d 787, 20 RR 2d 249 (1970).

[44] There is no indication that the Broadcast Bureau was aware of Beeny's impermissible solicitations prior to the receipt of the *ex parte* letters at the FCC. Compare *Quest for Life, Inc.*, 10 FCC 2d 220, 221, 11 RR 2d 346, 348 (1967).

ULTIMATE CONCLUSIONS

49. It is the conclusion of the Review Board that Voice of Reason has engaged in an unauthorized *de facto* transfer of control of Station KICM and that its application herein must accordingly be denied. We also conclude, as did the Presiding Judge, that this application must also be denied because of the applicant's failure to demonstrate its financial qualifications. Finally, we affirm the Presiding Judge in concluding that under the misrepresentation, Rule 1.65, and *ex parte* issues, the applicant has not shown it possesses the requisite character qualifications to be a Commission licensee. In view of the foregoing, it is concluded that the public interest, convenience and necessity would not be served by a grant of the application of Voice of Reason.

50. Accordingly, IT IS ORDERED, That the application of Voice of Reason, Inc. (KICM) (BP–18553) for a construction permit to operate the facilities of Station KICM, Golden, Colorado, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
SYLVIA D. KESSLER, *Member, Review Board.*

APPENDIX

RULINGS ON EXCEPTIONS OF VOICE OF REASON, INC.

Exception No.	*Ruling*
1, 3	*Granted* to the extent indicated in note 1 of this Decision; *denied* in all other respects as being without decisional significance.
2	*Denied* for the reasons set forth in paragraphs 23–25 of this decision.
4, 6	*Granted* in substance. See paragraphs 1 and 23–25 and note 23 of this decision.
5	*Denied.* These finding were correctly identified by the presiding judge as background material.
7	*Denied* for the reasons stated in paragraph 29 of this decision.
8, 13	*Granted* to the extent that the presiding judge did not indicate that the Agreement of Employment was subject to the pending assignment and renewal applications; *denied* in all other respects because in no event would such a language recitation, *per se*, "subject to Commission approval", negate the acts and conduct of Barton and Beeny which resulted in *de facto* transfer of control. Moreover, despite Voice of Reason's arguments in this regard, the wording of the two Agreements does not provide clear assurance of an intent that Commission approval precede any transfer of control. For example, neither Agreement specifies when or the circumstances under which Voice of Reason would petition the Commission to amend BAL–5912 to substitute Voice of Reason as assignee. *Cf. Bay Video, Inc. (WBVT–TV)*, 17 FCC 2d 628, 16 RR 2d 308 (1969); *Flathead Valley Broadcasters*, FCC 65R–161, 5 RR 2d 74.
9	*Denied:* (1) as being without decisional significance insofar as the use of the word "recite" as opposed to "show" would not alter the import of these facts; and (2) in all other respects, for the reasons set forth in paragraphs 13–15 of this decision.

Exception No.	*Ruling*
10	*Denied* for the reasons stated in paragraphs 13–15 of this decision.
11	*Denied* for the reasons stated in paragraphs 16 and 17 of this decision.
12	*Denied.* The presiding judge's findings adequately and accurately depict the provisions of the Memorandum of Agreement. Also, see paragraphs 16 and 17 of this decision.
14	*Granted* to the extent that preparation of an assignment application had begun on September 14, 1968; *denied* in all other respects in that the record evidence cited by Voice of Reason does not establish the extent of attorney Sells' knowledge of the $60,430.59 loan, the circumstances surrounding it, or any understanding on his part that the loan was to to be utilized in establishing Voice of Reason's financial qualifications.
15	*Granted.*
16	*Denied* for the reasons stated in paragraph 16 of this decision.
17, 17(a)	*Denied* for the reasons stated in paragraph 18 of this decision.
18	*Denied* for the following reasons: In its application, the applicant based the $10,000 equipment cost on its estimate of what it would have to pay the FDIC, which was then holding station KICM's equipment as Receiver in Bankruptcy. In May 1970, the FDIC sold the equipment to another purchaser and in Voice of Reason's Exhibit No. 27, submitted at the hearing, the applicant estimated it could be purchased from this party at less than $10,000. Although in its original application Voice of Reason estimated new equipment, if needed, would cost $32,000, in its Exhibit No. 27 and in this Exception, this figure was reduced to $21,000. The operating expenses were also reduced in this Exception to $54,000. No amendment to reflect or explain these reductions was submitted. Hence, the Board concludes that the following should be considered Voice of Reason's first-year costs: $6,000 for legal and engineering fees; $32,000 for equipment because (a) the contention that the equipment could be purchased at $10,000 has not been adequately supported in the record, (b) the applicant insisted in its own exceptions that the Presiding Judge incorrectly stated its equipment costs to be $10,000 and should have listed them at $21,000, and (c) the $32,000 figure was arbitrarily reduced to $21,000 without explanation. In addition, the applicant's first-year operating costs include $75,000 as expenses; however, the applicant has not amended to substitute any reduced figure and has in no way explained how such costs are reduced to $54,000. Hence, total first-year expenses aggregate a total of $113,000. See footnote 34 of this decision.
19	*Denied.* The presiding judge's conclusion accurately reflects the findings in the record and is consistent with his subsequent findings. See paragraphs 89 and 93 of the initial decision.
20, 29	*Denied* for the reasons set forth in paragraphs 33 and 34 of this decision.
21	*Granted.* However, see Ruling on Exception 22, below.

Exception No.	*Ruling*
22	*Denied.* The only correction necessary to paragraph 90 of the initial decision (the subject of Ruling 21, above) is to reflect that the testimony does not indicate which organization, Freedom Baptist Temple or Voice of Reason, had executed the alleged contract. No mischaracterization of the record flowed from that minor error into paragraph 91, however.
23	*Granted* in that the presiding judge's language may be ambiguous. For purposes of clarification, the Certificate of Title to the Missouri Youth Ranch reflects that it is subject (1) to a quitclaim deed from Gospel Revival Hour to Voice of Reason in July 1968; and (2) to a Deed of Trust executed by Voice of Reason in July 1968 to secure payment of the $60,430.59 note.
24	*Denied.* The presiding judge's findings adequately and accurately reflect the record.
24(a), 24(f), 26, 28, 30	*Denied* for the reasons stated in paragraph 43 of this decision.
24(b) to 24(e)	*Denied* for the reasons set forth in paragraphs 13–16 of this decision.
27	*Denied* as being without decisional significance.
29(a), 29(b)	*Granted* in part; *denied* in part. See paragraph 31 of this decision.
29(c), 29(d), 36, 38	*Denied* for the reasons stated in paragraphs 42–44 of this decision.
31, 31(a) to 31(h)	*Denied* as being without decisional significance. See paragraph 34 of this decision.
32, 37	*Denied* for the reasons stated in paragraph 34 of this decision.
33	*Denied.* Most of the additional findings requested were made by the presiding judge in paragraphs 107 and 109 of his initial decision.
34, 39	*Denied* for the reasons set forth in paragraphs 47–48 of this decision.
40	*Denied* for the reasons set forth in this decision.

RULINGS ON EXCEPTIONS OF THE BROADCAST BUREAU

Exception No.	*Ruling*
1, 4, 5, 7, 8, 12, 25	*Granted* to the extent that our decision here is based on a *de facto* transfer of control and the additional information corroborates our resolution of the issue on the grounds set forth in the decision; *denied* to the extent that these exceptions are geared to the question of a *de jure* transfer of control. As indicated in paragraph 3 and note 6 of our decision, we need not and do not reach the question of *de jure* transfer of control.
2	*Granted* in part; *denied* in part. See paragraph 17 of this decision.
3, 6	*Granted* in substance. See paragraphs 13–15 of this decision.
9	*Granted.*
10	*Granted* in substance. See paragraphs 17 and 19 of this decision.
11, 27, 28	*Granted.* The extent of Norman's awareness of Station KICM affairs during the period in question is not set forth on the record, and the findings objected to are not supported by the evidence of record.
13	*Denied.* The presiding judge's findings fairly and adequately reflect the evidence of record.
14, 15, 22, 24	*Granted.* See paragraph 17 and note 26 of this decision.

Exception No.	*Ruling*
16, 17, 18, 34	*Granted* in substance. See note 36 of this decision. Also, see paragraph 43 herein.
19, 23	*Granted* to the extent indicated in paragraphs 20–21 of this decision; otherwise *denied*.
20	*Granted* in substance. See note 24 of this decision.
21	*Granted* in part; *denied* in part. See paragraph 18 and note 22 of this decision.
26	*Granted*. See paragraphs 17–19 and 22 of this decision.
29, 35, 36	*Granted* in substance. See paragraph 4 of this decision.
30	*Granted*. See Section I (paragraphs 6–22) of this decision.
31, 32	*Denied* as being of no decisional significance. See paragraph 34 of this decision.
33	*Granted* in substance. See paragraph 34 of this decision.
37	*Denied* as being of no decisional significance.

F.C.C. 71D-12

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of VOICE OF REASON, INC. (KICM), GOLDEN, COLO. For Construction Permit	Docket No. 18710 File No. BP-18553

APPEARANCES

Jerome J. Duff, on behalf of Voice of Reason, Inc.; *Joseph Stirmer*, *Vergil W. Tacy* and *Philip V. Permut*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER BASIL P. COOPER

(Issued March 17, 1971; Released March 23, 1971)

PRELIMINARY STATEMENT

1. The Commission, by order (FCC 68-989) adopted October 2, 1968, released October 9, 1968, designated for hearing the application of North America Broadcasting Company for renewal of license of Station KSVN, Ogden, Utah (Docket No. 18343) and the application of George I. Norman, Jr. and Philip B. Rosenthal, Joint Venturers, d/b as Norman Broadcasting, for renewal of license of Station KICM, Golden, Colorado (Docket No. 18344). Seven issues were specified in the designation order. Issue 4 read:

"To determine whether Norman arranged, participated in or effected one or more unauthorized transfers of control of the license of Station KICM, Golden, Colorado, in violation of Section 310(b) of the Communications Act."

2. On March 26, 1969 the licensee of Station KICM discontinued its operation and surrendered for cancellation the license for such station. The Commission, thereupon, cancelled the license and all authorizations for Station KICM and deleted the call letters. The Hearing Examiner, by order issued April 11, 1969, released April 14, 1969 (FCC 69M-438) terminated the proceeding in Docket No. 18344.

Background material

3. On October 10, 1966, the Commission accepted for filing an application wherein George I. Norman and Philip B. Rosenthal, Joint Venturers, d/b as Norman Broadcasting, sought Commission consent to assign the license of Station KICM, Golden, Colorado, to Greater Leasing Company (BAL-5912). Exhibits filed with said assignment application identify certain contracts which shed light on events hereinafter mentioned.

4. On September 1, 1966, Greater Leasing Company leased to George I. Norman, Jr. for 20 years beginning September 1, 1966 the physical assets of Station KICM and subleased to Norman the land on which the station was located. Norman, as the lessee, was obligated to pay rent for these facilities at the maximum rate of $30,000 per year for three years, $24,000 per year for seven years, and $18,000 for the next ten years. Said payments were to be paid from, and only from, the net profits and cash receipts remaining after all KICM expenses were paid.

5. In a document executed September 30, 1966 wherein George I. Norman is identified as the seller and Donald S. Cooper, Delmar E. Cooper and LaVor N. Wood are identified as the buyers, George I. Norman transferred all of his rights in the 90,000 shares of Greater Leasing Company to the buyers in return for the agreement of the buyers to hold him harmless on certain notes numbered 6646, 6667, 6870, 6879 and 6997 due at the Rocky Mountain Bank of Lakewood, Colorado. It was agreed that Greater Leasing Company owned certain broadcast properties used by Station KICM subject to a chattel mortgage in the amount of $80,000, the lease of the facilities to Norman as identified above, and that Greater Leasing Company was bound on specified obligations including the note of $80,000 due Rocky Mountain Bank secured by the chattel mortgage on the equipment, a note payable to LaVor R. Wood in the principal amount of $7,598.01 and a note payable to J. Robert Jensen in the principal amount of $35,000, the interest on said notes as well as sums due on leases of land for the transmitter site and office space.

6. In the assignment application, the officers, directors and stockholders of Greater Leasing Company were identified as follows:

	Shares	Percent
LaVor R. Wood (president and director)	15,000	15
J. Robert Jensen (secretary-treasurer and director)	10,000	10
Delmar E. Cooper (director)	37,500	37.5
Donald S. Cooper (director)	37,500	37.5

Delmar E. Cooper was identified as president of the Rocky Mountain Bank. Donald S. Cooper was identified as president of the Westland Industrial Bank. Delmar E. Cooper and Donald S. Cooper are brothers. Each is a minister. J. Robert Jensen is shown to have graduated from the Radio Institute of Chicago with a Bachelor, Radio and Television Degree, and to have been manager of Station KICM from April 1965 to the present.

7. On December 23, 1966, Delmar E. and Donald S. Cooper transferred all of their interests in Greater Leasing Company to Soldiers of the Cross, a religious organization. This stock, however, was pledged as collateral for a loan to the Rocky Mountain Bank.

The issues

8. The Commission, by order adopted October 22, 1969, released October 27, 1969 (FCC 69–1158), designated the application of Voice

of Reason, Inc. for permanent authority to operate Station KICM, Golden, Colorado, on 1250 kc, 1 kw, DA, daytime only, for hearing to determine whether an unauthorized transfer to Voice of Reason, Inc. did occur and, if so, the impact of the applicant's participation in the transfer on its qualifications to be a broadcast licensee. Pursuant to a petition to enlarge issues filed March 18, 1970 by the Broadcast Bureau, the Review Board, by Memorandum Opinion and Order adopted April 23, 1970, released April 24, 1970 (FCC 70R–154), added an issue to determine whether Voice of Reason, Inc. solicited ex parte presentations in violation of Section 1.1225 and whether such conduct reflected adversely upon its basic qualifications to be a Commission licensee. Pursuant to a further petition to enlarge issues filed May 1, 1970 by the Broadcast Bureau, the Review Board, by Memorandum Opinion and Order adopted June 10, 1970, released June 11, 1970 (FCC 70R–209), added misrepresentation, Section 1.65 and availability of funds issues against Voice of Reason, Inc. In the order of designation and for reasons of clarity, the issues have been renumbered as follows:

1. To determine whether the Voice of Reason, Inc., through its principals participated in an unauthorized transfer of control of Station KICM, Golden, Colorado, in violation of Section 310(b) of the Communications Act of 1934, as amended, and if so, the impact of such participation on the qualifications of the Voice of Reason, Inc., to be a broadcast licensee.

2. To determine whether the applicant, Voice of Reason, Inc., solicited *ex parte* presentations in violation of § 1.1225 of the Commission's Rules, and, if so, to determine whether such conduct reflects adversely upon Voice of Reason, Inc.'s basic qualifications to be a Commission licensee.

3. To determine whether Voice of Reason, Inc. has made misrepresentations to the Commission as regards its assets and liabilities in its balance sheet filed with its application on April 2, 1969.

4. To determine whether sufficient funds are available to Voice of Reason, Inc. to construct and to operate its proposed station for one year without revenue.

5. To determine whether Voice of Reason, Inc. has complied with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission advised of substantial changes.

6. To determine, in light of the facts adduced pursuant to the foregoing issues, whether Voice of Reason has the requisite qualifications to be a Commission licensee.

7. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

9. The Review Board ordered that the burden of proceeding with the introduction of evidence on Issues 2, 3 and 5 shall be on the Broadcast Bureau, the burden of proceeding with the introduction of evidence on Issue 4 shall be on Voice of Reason, Inc., and the burden of proof under all of the added issues shall be on Voice of Reason, Inc.

10. Prehearing conferences were held on December 8 and 19, 1969, March 10 and June 10, 1970. Hearing sessions were held on July 7, 8, 9 and 10, 1970, in Denver, Colorado, and on September 28 and 29 and October 8, 1970, in Washington, D.C. The record was closed on October 8, 1970. Proposed findings of fact and conclusions of law were filed by the Broadcast Bureau on November 20, 1970. Voice of Reason, Inc. filed its proposed findings of fact and conclusions of law and simultaneous reply to the Broadcast Bureau's proposed findings in a single document filed December 21, 1970. The Broadcast Bureau filed a reply on January 4, 1971.

FINDINGS OF FACT

Re participation in unauthorized transfer of control of station KICM—issue 1

11. The Rev. Bill Beeny graduated from the Georgetown (Kentucky) Baptist College with a degree of Bachelor of Arts. He also graduated from Shurtleff College in Illinois which is under the auspices of the American Baptist Convention. He was awarded a Doctor of Divinity degree by the American Divinity College because of his work with the Missouri Youth Ranch. As of July 1970, he had been actively engaged in the ministry for the past 23 years. He has been appearing on a local radio station in St. Louis, Missouri, broadcasting daily for approximately 20 years. During the last 10 years, he has been on a network of stations with a 15-minute daily broadcast and as of the date of the hearing his broadcasts were appearing on some 51 to 52 stations.

12. The Rev. Oliver Kenneth Goff, since 1942, has been the national director of the Soldiers of the Cross and pastor of the Soldiers of the Cross Tabernacle. The Soldiers of the Cross is a Christian patriotic corporation with which are associated churches that have taken a stand against communism.

13. Jerome K. Duff, the attorney for Rev. Beeny, is a general practitioner with offices in St. Louis, Missouri. Francis R. Salazar, the attorney for George I. Norman, Jr., is a practicing attorney with offices in Denver, Colorado. Neither Duff nor Salazar is a communications attorney as that name is known to practitioners before the Federal Communications Commission.

14. On or before June 1, 1968, the Rev. Kenneth Goff communicated with a number of ministers, including Rev. Beeny and Donald Cooper, thinking that they might be interested in acquiring the facilities of Station KICM. The controlling stock in the Greater Leasing Company was at that time held by the Soldiers of the Cross. Rev. Donald Cooper called Beeny in early June 1968 and asked if Beeny would be interested in purchasing Station KICM. Rev. Beeny was interested and flew to Colorado where in early June he met with Rev. Donald S. Cooper, Rev. Delmar E. Cooper, attorney Francis R. Salazar (attorney for George I. Norman, Jr.), J. Robert Jensen, then manager of KICM, and Leo Van Etten, then engineer at the station. Rev. Goff was present at the meeting which had been continued at a restaurant. On this visit, Rev. Beeny visited all of the facilities and discussed the

purchase of Station KICM. Rev. Beeny made a second trip to Golden and by the completion of this trip he had decided to acquire Station KICM if possible. On these trips he found that Station KICM had shut down except for the transmitter. Dust was over the furniture. The station was being operated solely by the chief engineer who played records and kept the transmitter logs. The station had no advertising accounts.

15. Rev. Beeny recalls that those in charge expressed an urgent need for a manager who could put the station in order and secure needed revenue. He recommended highly Mr. Fred Barton whom he had known in the St. Louis area.

16. Rev. Beeny understood that attorney Salazar held a general power of attorney for George I. Norman, Jr., that the Cooper brothers were principals in Greater Leasing Company which at the time was the proposed assignee of the license of Station KICM, and that the Rocky Mountain Bank held certain mortgages on station properties.

17. On or before June 17, 1968, the attorneys involved, Duff and Salazar, prepared two instruments, (a) a "Lease and Purchase Agreement" between Greater Leasing Company as lessor and Voice of Reason, Inc. as lessee; and (b) an undated "Agreement of Employment" between George I. Norman, Jr., d/b as Norman Broadcasting, licensee of Station KICM, as "EMPLOYER" and Voice of Reason, Inc. as "MANAGEMENT COMPANY".

18. The terms of the Lease and Purchase Agreement follow, in the main, provisions found in numerous documents wherein the owner leases property, retains title and gives the lessee an option to purchase. It was stated that both lessor and lessee were aware of the then pending application for the renewal of license of Station KICM as well as the then pending application to assign the license of Station KICM to lessor, Greater Leasing Company. This document specified that the lessee, Voice of Reason, Inc., would request the Federal Communications Commission to permit the presently pending assignment application (BAL–5912) to be amended to the end that ownership in the station would be Bill Beeny—75%, Kenneth Goff—15%, and J. Robert Jensen—10%.

19. It should be noted that this Lease and Purchase Agreement dealt only with the equipment or "hardware" used by Station KICM. It did not involve the license or day-to-day control of the station.

20. Rev. Beeny testified that he had never met George I. Norman, Jr. and that he had never seen any proposed agreement of employment or management contract which Norman had signed.

21. The draft of the undated Agreement of Employment provides, in part, that George I. Norman, Jr., d/b as Norman Broadcasting, referred to as the " 'EMPLOYER' is willing to assign rights to manage 'LICENSE' to THE VOICE OF REASON, INC., hereinafter referred to as 'MANAGEMENT' . . . subject to the pending application B.A.L. 5912 . . ."; that " 'EMPLOYER' does assign the management of 'LICENSE' and all advertising contracts, to the 'MANAGEMENT COMPANY' " which was to assume the duties of running

"LICENSE"; but provides in paragraph 8 "That George I. Norman, Jr., d/b/a Norman Broadcasting (the 'EMPLOYER' herein) will always retain full and complete supervisory authority over 'MANAGEMENT' . . ." In brief, this agreement, if consummated, would have placed Voice of Reason, Inc. (a then nonexisting corporation) in the position of an independent contractor operating Station KICM. It is all too obvious from the terms used and the phrasing of this draft that it was not prepared by any person having even a slight working knowledge of broadcast terms or of the FCC rules and regulations.

22. Attorney Jerome J. Duff, after consulting Rev. Beeny, prepared a written memorandum which he sent to attorney Salazar and Donald Cooper on June 25, 1968. The memorandum contained a number of suggested changes or modifications in the proposed Lease and Purchase Agreement and the Agreement of Employment. In his memorandum of June 25, 1968 attorney Duff wrote:

> "In enumerating these areas of modification we have borne in mind the fact that Norman must appear to be in control for F.C.C. purposes. It is our recollection and understanding that certain of the modifications may require separate agreements in order to achieve a satisfactory arrangement and yet retain sufficient indication of Norman control for F.C.C. purposes."

23. On July 3, 1968, Mr. Donald Cooper and attorney Salazar came to St. Louis, Missouri, and met with Rev. Beeny and attorney Duff at a motel. The purpose of this meeting was to try to iron out the differences between the parties as to the terms of the agreement or agreements. It is clear that by the close of this meeting or shortly thereafter, Rev. Beeny intended to acquire Station KICM if it was possible.

24. Voice of Reason, Inc. was incorporated in the State of Colorado as a not-for-profit corporation. The articles of incorporation were executed on July 10, 1968; the official certificate of incorporation is dated July 11, 1968. At the time of incorporation, the directors and incorporators were Bill Beeny, Jerome J. Duff and Logan N. Cox. A resolution of corporate board dated July 10, 1968 identifies the officers who had been duly elected to have been Bill Beeny, president; Logan N. Cox, vice president; and Jerome J. Duff, secretary.

25. The articles of incorporation limit the number of directors to three. The initial Colorado registered agent and address was that of Logan N. Cox. On March 24, 1969, the registered Colorado agent and address was changed from that of Logan N. Cox to Fred Barton who was identified as vice president of Voice of Reason, Inc.

26. The application of Voice of Reason, Inc., filed April 2, 1969, lists the officers and directors of the applicant as Rev. Bill Beeny, president and director; Fred Barton,[1] vice president and director; Delores Estes and Walter Lipskoch, directors. The address of Rev. Bill Beeny, Delores Estes and Walter Lipskoch is given as Gospel Revival Hour, Inc., St. Louis, Missouri.

27. The Gospel Revival Hour is a Missouri not-for-profit corporation created for the purpose of dispensing the gospel and doing an amount of social work with underprivileged children at the Missouri

[1] Legal name is Fred Coukart.

Youth Ranch. In 1969 the officers and directors were Rev. Beeny, Mrs. Delores Estes and Mr. Walter Lipskoch. (Tr. 744) It was not a church in the sense that it had a congregation. It was supported largely through freewill contributions that were derived from radio station broadcasts and a mailing list. In lay terms, the Gospel Revival Hour was the radio voice of Rev. Beeny which at the time of the hearing was being heard on some 51–52 broadcast stations located throughout the United States.

28. By quitclaim deed signed and acknowledged on July 10, 1968, the Gospel Revival Hour, a Missouri not-for-profit corporation of which the Rev. Bill Beeny was president, conveyed to Voice of Reason, Inc. a tract of land in Warren County, Missouri, containing 99.934 acres. This tract of land is frequently identified in this record as the Missouri Youth Ranch.

29. On July 12, 1968, Rev. Beeny, Delmar Cooper, Donald Cooper, Francis Salazar and Jerome Duff met in the conference room of the Rocky Mountain Bank, Golden, Colorado. Name cards identified Mr. Salazar as chairman of the board, Delmar Cooper as president and Donald Cooper as vice president. Mr. Salazar was the attorney for the bank. While the drafts of the Lease and Purchase Agreement were on hand, no finished document had been prepared or signed. In the original drafts, Voice of Reason, Inc. was to make an escrow deposit of $20,000 which was to be held in an escrow account of the bank until a bill of sale of the leased equipment was delivered to Voice of Reason, Inc.

30. Rev. Beeny was surprised when he was asked to sign a $60,430.59 note but was led to believe that the total money was to go into an escrow account until the FCC had acted on the petition to acquire the station. At the meeting, Rev. Beeny and attorney Duff signed certain escrow opening account cards. Rev. Beeny received three cashier's checks in the amounts of $25,000.00, $10,243.10 and $25,187.49, all of which were made payable to Voice of Reason, Inc. and Dr. Bill Beeny. Following the signing, Delmar Cooper, president of the bank, left the room taking with him the escrow cards and the endorsed checks.

31. As security for the $60,430.59 note, Voice of Reason, Inc., by Rev. Beeny, president and chairman of the board, executed on July 10, 1968 a Deed of Trust wherein Voice of Reason, Inc. conveyed title to the Missouri Youth Ranch to Ralph Hunsche, Manager, Title Insurance Corporation, St. Louis, Missouri, to hold the same in trust to secure the payment of the note in question to the Rocky Mountain Bank of Lakewood, Colorado. This Deed of Trust was filed of record on July 12, 1968, Book 133, page 113, of the land records of Warren County, Missouri.

32. The minutes of the Loan and Discount Committee of the Rocky Mountain Bank show that the $60,430.59 note money was to be used to (a) pay off Note No. 6870 in the face amount of $10,000 plus interest, (b) pay off Note 8047 in the amount of $25,187.49 plus interest, and (c) pay to Westland Industrial Bank $25,000 for payment of Loan No. ----------.

33. The minutes establish that the loan, secured by the property previously identified as the Missouri Youth Ranch, was carried by a

two to one vote, Salazar and Donald S. Cooper voting for the loan and Mr. I. Tom Curry voting against granting the loan.

34. It may never be possible to identify by name each individual who received specified parts of the $60,430.59 for which Rev. Beeny and Voice of Reason, Inc. gave their note on July 12, 1968. It is, however, clear that the $60,430.59 went to George I. Norman, Jr. or passed through the hands of those who were in one way or another obligated to him through Greater Leasing Company, its former officers, directors and stockholders.

35. On July 19, 1968, a rough draft of a Memorandum of Agreement between the Rocky Mountain Bank of Lakewood, Colorado and Voice of Reason, Inc. was prepared. In this agreement, the bank agrees that the maximum liability for all indebtedness contracted by Voice of Reason, Inc. for the purchase of Station KICM in the event the FCC fails to "issue an operating license" to Voice of Reason, Inc. shall be $25,000 and in the event Voice of Reason, Inc. is not duly licensed by the FCC "all collateral presently held by the BANK as supplied by V. of R. will be immediately returned to V. of R. and all encumbrances removed upon the payment by V. of R. to the BANK of Twenty-Five Thousand Dollars ($25,000.00) only." In addition the bank agreed to contract for radio advertising on Station KICM in the minimum amount of $800.00 per month for a period of twelve consecutive months beginning July 15, 1968.

36. Rev. Beeny continued to press for a clarification of the use to which the $60,430.59 note was put until he found that George I. Norman, Jr. was negotiating with Mr. S. H. Patterson for the sale of Station KICM to Patterson or his company. He then began to demand the return of his money or a new contract. He and those who tried to come to his rescue were complete "babes in the woods" when it came to FCC nomenclature and procedures. They did not understand that the purchase and sale of station "hardware" did not require Commission approval and that ownership of station "hardware" did not in and of itself mean authority to operate a broadcast station. Donald S. Cooper, in his letter of August 8, 1968 to Dr. Kenneth Goff; Dr. Kenneth Goff, in his letter of October 9, 1968 to Rev. Beeny; and Donald S. Cooper, in a telegram dated October 11, 1968 sent to attorney Duff, refer to a "contract" said to have been signed at a meeting at a motel in St. Louis, Missouri, on the night of July 3–4, 1968 attended by Donald S. Cooper, Rev. Beeny, attorneys Duff and Salazar but NOT by George I. Norman, Jr.

37. On July 19, 1968, attorney Duff forwarded to attorney Marcus Cohn, an FCC practitioner, the copies of the Lease and Purchase Agreement and the Agreement of Employment and arranged to meet with Mr. Cohn on Wednesday, July 24, 1968. Attending that conference were Rev. Beeny, attorneys Duff and Salazar and Marcus Cohn. Attorney Salazar, in his letter of October 16, 1968, wrote that at this meeting Marcus Cohn had advised that the proposed management contract as drawn was "very bad" and should not be used in any way. Salazar wrote that Mr. Cohn had stated that the management contract could be considered a premature transfer of the KICM license and that it should not be used, and he, Salazar, Beeny and Duff agreed

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immediately that it would not be used. After they left Cohn's office, the three had agreed that the management contract was void and would not be utilized.

38. By letter dated August 1, 1968, attorney Marcus Cohn advised attorney Duff that he had checked into the minutes of the station and stated, in part, "I am convinced, based upon our examination of the Commission's files and conversations with its staff, that any attempt to assign the license to Reverend Beeny would involve a hearing at the Commission. The station and its operation by Norman has been a source of controversy, to put it mildly." Mr. Cohn also advised that because of the stress of business, he would be unable to represent Beeny in this matter. A copy of that letter was sent to Francis Salazar.

39. The record does not contain the specific provisions of the Agreement of Employment or management agreement which Mr. Cohn found objectionable but the document itself, if carried through, would have placed Voice of Reason, Inc. in the basic position of an independent contractor operating Station KICM. This, absent Commission consent, would be in violation of Section 310(b) of the Communications Act and of the FCC rules.

40. In September 1968, Voice of Reason, Inc. employed attorney Harry G. Sells to represent it. Sells, after meeting with Rev. Beeny on September 13, 1968, talked with Fred Barton regarding programming of Station KICM.

41. By letter dated November 19, 1968, Sells, as attorney for Voice of Reason, Inc., forwarded to the Commission the drafts of (a) the Lease and Purchase Agreement of June 17, 1968, and (b) the Agreement of Employment.

42. Sometime after March 26, 1969 when Station KICM went dark, Barton forwarded some papers to attorney Sells. At that time Barton was vice president of Voice of Reason, Inc. having held such position at least on and after March 24, 1969. On April 2, 1969, Voice of Reason, Inc. filed its application for interim and permanent authority to operate Station KICM. Two "cover" pages referred to the Lease Purchase Agreement and the Agreement of Employment, both of which were said to have been entered into at the same time.

43. The first of the "cover" pages contains a sentence reading "Upon advice of Mr. Norman, an officer of Voice of Reason, Inc., Fred Barton commenced managing the Station under his direction." This sentence was phrased poorly. George I. Norman, Jr. was never represented to the Commission to have been an officer of Voice of Reason, Inc. As shown in paragraph 25, *supra*, Fred Barton became an officer and the Colorado resident agent of Voice of Reason, Inc. replacing Logan N. Cox on March 24, 1969.

44. On or about July 14, 1968, Mr. Fred Coukart, known by his professional name as Fred Barton, came to Golden to manage Station KICM.

45. Prior to coming to Golden, Mr. Barton had been in the broadcast field for some 23 years and had done almost everything from sweeping the floors to serving as general manager of an AM station and as assistant general manager of a television station. While employed at

Station WIL, St. Louis, Missouri, he met Rev. Beeny. Barton managed Station KXEN, St. Louis, which had a religious format. Rev. Beeny was a client of Station KXEN. Barton had spoken at the Youth Ranch at a religious gathering.

46. Rev. Beeny had asked Barton to go to Golden and look over Station KICM. Barton drove to Golden and talked with Mr. Donald Cooper, president of the local bank. After returning to St. Louis, Barton talked with Rev. Beeny in the course of which Barton expressed a willingness to manage Station KICM for $200 per week with the understanding that if and when Rev. Beeny got the station, he would receive a 5% commission on the gross which Barton hoped would reach $300,000 within a few years. Barton testified that while he had no contract for $200 per week, he knew that the salary was going to come from the operation of the station. Barton resigned his position with Station WIL and came to Golden.

47. When Barton arrived at the station on July 14, 1968, no one knew he was coming. He called Mr. J. Robert Jensen, the manager to whom he had been introduced by Mr. Donald Cooper. Shortly after arriving Barton talked with Mr. Salazar and was given to understand that Salazar was the voice of George I. Norman, Jr.

48. Immediately after taking over as manager of Station KICM, Barton instituted an all-religious format which he had decided on before coming to Golden. Within the next two or three days, he received a phone call from attorney Salazar who informed him that Mr. Norman did not want the station run as a religious station. Barton immediately took the religious programs off in the afternoons and substituted good music, semiclassical, light classical and light pop, but kept the morning religious programming as it was from this programming that the station was receiving its money.

49. It was Barton's understanding that Mr. Salazar was Mr. Norman's attorney and when he, Salazar, spoke it was George Norman speaking unless Mr. Norman was there. Barton did not meet Norman until a month or six weeks after he arrived in Golden. This meeting, held in mid-August 1968, was in Mr. Salazar's office and confirmed Barton's belief that for Station KICM Salazar was George Norman. Barton brought to this meeting a bunch of old bills which had been received during the preceding month. Norman, on looking at them, would say "this one has been paid," etc., and then threw them into a wastebasket. Norman wanted the sum of $350 which a local church owed the station for time, but Barton told him that it had been collected, spent in station operation and was not available. Barton knew that while Norman had been paying the salaries of station employees, they were always paid late.

50. Salazar informed Norman that he, Salazar, was the chairman of the board of the Rocky Mountain Bank in which Barton had opened the checking account.

51. When Fred Barton arrived in Golden, he knew of the desire of Rev. Beeny to acquire Station KICM and that a substantial increase in his earnings would follow successful operation. He knew also of the dire financial straits of the station. Rev. Beeny arranged to move

Barton's family and personal effects to Golden, paid his first week's salary and gave him a check in the amount of $1,000 plus a personal advance of $200. This $1,200 was payment for time which Beeny used on the station. Barton brought some of Rev. Beeny's tapes with him which he put on the station. He had talked with Donald Cooper and J. Robert Jensen, the prior station manager, both of whom were officers of Greater Leasing Company, the then proposed assignee of the station.

52. In order to protect his own salary and the anticipated revenues of the station, Barton opened a checking account in the Rocky Mountain Bank under the name of Voice of Reason on July 24, 1968. Fred Barton was the only person authorized to sign checks on this account. All station income was put into this account. All expenditures, including salary payments, were handled through this account.

53. On July 25, 1968, Barton had the Public Service Company of Colorado put the account of the station in the name of "Voice of Reason per Fred Barton."

54. On July 28, 1968, he had the telephone account for the station changed from KICM to Voice of Reason, Inc. In July 1968, he rented P. O. Box 352 under the name of Voice of Reason. He drew up new contract forms, the heading of which read: 303—279-3013, Radio Station KICM, Box 352, Golden, Colorado 80401.

55. Barton leased an A.P. wire for the station under the name of Voice of Reason. Acting on his own, he hired a secretary and determined the salary which was paid her.

56. Except for Rev. Beeny, Barton gave religious broadcasters discounts for advance payments. In this way he got funds with which to operate the station. All operational money came from station accounts. As far as Barton knew neither George Norman, Rev. Beeny or anyone else put one cent into the operating end of the station.

57. While on the witness stand, Barton identified a number of letters as follows: August 24, 1968 from Norman; October 1, 1968 from Norman; October 2, 1968 from Barton to Norman; December 17, 1968 from Barton to Donald Cooper; September 1, 1968 from Norman; September 19, 1968 from Barton to Norman; and October 28, 1968 from Norman. In these letters, Norman was informing Barton how he, Norman, wanted the station run and Barton in reply was reporting back to Norman or Donald Cooper.

58. While manager of Station KICM, Barton received two letters concerning bonds purportedly having been issued by KICM Broadcasting, Incorporated, a nonexisting corporation. It was from such letters and in contact with the general public that both Barton and Rev. Beeny came to the conclusion that the manner in which Norman had used the facilities and the call letters of Station KICM was less than exemplary.

59. Barton, finding that the station had few, if any, friends immediately joined the Chamber of Commerce, attended meetings, contacted local merchants and clubs in the hope of building a new image.

60. According to Barton, Dr. Beeny "had no role" in the day-to-day operation of the station; that Beeny's role was financial; and Beeny, through his advertising agency, was obtaining religious accounts which were subject to being either accepted or rejected.

61. Mr. Barton knew from conversations with Rev. Beeny, Mr. Norman and attorney Salazar that the parties were negotiating for the sale of Station KICM but "I realized there were differences because I knew that they couldn't get together. To my knowledge they never met. They were handling everything through a third party, Mr. Salazar." Asked if the negotiations ever resulted in a completed contract, Barton replied, "I never saw a contract, no, sir. Mr. Norman denied that there was any such completed contract. So did Mr. Salazar."

62. Mr. Barton recalls that Mr. S. H. Patterson, his son, Delbert, and his grandson came to the station and explained that they were engineering consultants or management consultants. They asked to see everything, books, contracts, balance sheets, the whole works. Barton tried unsuccessfully to contact Mr. Norman. He then called Mr. Salazar who informed him that Mr. Norman said to go ahead and cooperate in every way. Barton later contacted Mr. Norman and learned that the Pattersons were interested in obtaining Station KICM. Barton recalls that Mr. Norman said he had not completed a contract with Rev. Beeny, and to cooperate with the Pattersons in every way as they were negotiating to purchase the station. Following the receipt of these instructions, Barton took Mr. Patterson to city council meetings, took him to all of the city officials and got the council to approve him as an applicant. This record does not establish the date on which S. H. Patterson, d/b as Mt. Tabor Radio Company, forwarded to the Commission the application to assign the license of Station KICM, but KICM Exhibit 25 establishes that that application was returned to the proposed assignor on March 10, 1969 because of the pendency of a previously filed assignment application. It is assumed that the assignment application referred to was BAL–5912 (see paragraph 3, *supra*). Mr. Barton recalls that Mr. Patterson told him that the application to transfer Station KICM to the Pattersons had been turned down by the FCC.

63. Barton, as manager of Station KICM, arranged for various advertising contracts, trade-outs, etc., and, in general, performed the duties of a general manager of a broadcast station. He recalls that he signed five copies of a contract wherein his duties, obligations and limitations as general manager were spelled out. He dropped these signed forms in attorney Salazar's mail box but he never saw them again.

64. Shortly before 6:00 a.m. on the morning of Thursday, March 26, 1969, Barton received a phone call from George I. Norman, Jr. who informed him that "we don't go on the air today"; Norman called back a few moments later and said he was verifying a call he had made to the chief engineer that the station was off the air as of that date.

65. During the period July 14, 1968 through March 26, 1969, Fred Barton was a man of limited means. After his family arrived in Golden, he wanted to remain as his wife found the high atmosphere beneficial. He felt obligated to Rev. Beeny, cooperated with him in every way possible and kept him informed as to what was going on at Station KICM. He knew it was through Rev. Beeny that most of the revenue for the continued operation of the station was to come. On

the other hand, Barton, a professional man with more than two decades in the operational end of the broadcast field, knew that the voice of the licensee must be heard and obeyed. Barton followed Norman's orders in changing, in part at least, the religious format which Rev. Beeny desired. He kept Norman's hands "out of the till" but followed Norman's instructions to aid S. H. Patterson in the latter's attempt to acquire the facilities of Station KICM. During the period July 14, 1968 through March 26, 1969, Barton found himself in an untenable position. Despite this fact he took over the management of Station KICM and rendered unto Caesar those things which were Caesar's. He so managed Station KICM as to enable Voice of Reason, Inc. to file with its application for construction permit numerous letters from leaders in the community commending Station KICM for the manner in which it had served the community during the period in question. In brief, Barton performed as a professional. He performed his duty as he saw it.

66. J. Robert Jensen testified that Mr. Norman had given him 10% of Greater Leasing Company for services performed. He had been secretary of said corporation and had been listed as manager of Station KICM from April 1965 until sometime in June or July 1968. During this time attorney Salazar involved himself in the station "very little". He recalls that Mr. Donald Cooper picked him up at his home, took him to the station and told him to answer Mr. Barton's questions. He knew that Donald Cooper was president of the Westland Industrial Bank and was an officer in Greater Leasing Company which had applied for FCC permission to become the licensee of Station KICM. He understood that Rev. Beeny, George Norman, Jr. and Greater Leasing Company were trying to make some kind of arrangement for the station. After the FDIC took over the assets of the bank or banks holding mortgages on the physical facilities of the station and offered them for sale, a corporation operating under the name of Jackson, Jensen, Jackson Advertising, of which he was president, purchased the facilities of Station KICM for $11,250 with the intent of filing an application for FCC authority to operate the station.

67. As shown in paragraph 6, *supra*, Jensen held a 10% stock interest in Greater Leasing Company which, in turn, was obligated to Jensen in the principal sum of $35,000 as per BAL–5912. In the draft of the Lease and Purchase Agreement of June 17, 1968, it was indicated that the ownership in the proposed station would be Bill Beeny—75%, Kenneth Goff—15%, and J. Robert Jensen—10%.

68. Attorney Francis R. Salazar stated that although he was the attorney for Mr. Norman, he was willing to testify in this hearing. He had specific instructions from Mr. Norman to represent him. Mr. Norman issued specific instructions that everything "must be done within the FCC rules and regulations." He stated that Mr. Barton became manager with the knowledge and approval of Mr. Norman. He recalls that the salary paid Mr. Barton as station manager was discussed, but he did not remember the details. He believes that Norman's

instructions relayed to Mr. Barton were complied with. In the negotiations at the Rocky Mountain Bank on July 12, 1968, he was representing the bank of which he was an officer as well as the attorney. He knew of the efforts taken to ascertain if Mr. Patterson could acquire Station KICM.

Summary findings

69. From 1965 to July 14, 1968, the manager of Station KICM, Golden, Colorado, was J. Robert Jensen, secretary-treasurer and director of Greater Leasing Company which, since October 10, 1966, had been the proposed assignee of the license of Station KICM in BAL–5912. On July 14, 1968, Fred Barton became the manager of Station KICM with the knowledge and consent of the officers of Greater Leasing Company.

70. Francis Salazar is the attorney for George I. Norman, Jr., the majority and senior member of the licensee. In mid-June 1968 and July 1968, Salazar worked on the agreements pursuant to which Voice of Reason, Inc. endeavored to purchase the "hardware" of Station KICM. He knew in June 1968 of the proposals under which Fred Barton was to become manager of the station. Salazar, as the attorney for George I. Norman, Jr., was in touch with Fred Barton on or shortly after July 14, 1968 and relayed to Barton instructions from Norman concerning the program format of Station KICM. Salazar was advised by a FCC practitioner on July 24, 1968 that the contemplated "management agreement" was "very bad" and should not be used.

71. In mid-August 1968, George I. Norman, Jr. met Fred Barton for the first time. At that meeting and thereafter Norman made it clear to Barton that he, Norman, intended to assert his authority as the majority or senior member of the licensee. Barton recognized this fact and acted accordingly.

72. Prior to July 14, 1968, Station KICM had been carrying the religious broadcasts of at least one church. Norman objected to and changed the all-religious format of Station KICM which Barton had initiated on July 14, 1968, but permitted Barton to continue the religious format during the morning hours. Rev. Beeny, through the purchase of time and the forwarding of contracts for religious broadcasts, aided materially in keeping Station KICM on the air on and after July 14, 1968. In this manner he helped "finance" the station. This financial support was with the knowledge and consent of the licensee.

73. Rev. Beeny, with no previous experience managing and operating a broadcast facility, may have wanted to exercise control over the day-to-day operation of Station KICM on and after July 14, 1968, but any idea that he, Beeny, Fred Barton or Voice of Reason, Inc. were actually in control was shattered shortly after Barton arrived at Station KICM and Norman asserted his authority. Any idea that Rev. Beeny or Voice of Reason, Inc. could legally exercise control over Station KICM through the proposed "Agreement of Employ-

ment" or "management agreement" was dispelled when he and his attorney met with FCC practitioner Marcus Cohn on July 24, 1968.

74. On November 19, 1968, Voice of Reason, Inc., through its FCC attorney, forwarded to the Commission the rough drafts of the "Lease and Purchase Agreement" of June 17, 1968 and the "Agreement of Employment" or "managment contract" together with suggested or proposed amendments thereto. No finished or completed agreement was signed by George I. Norman, Jr.

75. Fred Barton, after becoming manager of Station KICM, took steps to keep the hands of Norman "out of the till". The checking account of Station KICM was opened in the bank of which Norman's attorney was chairman of the board and of which an officer of Greater Leasing Company was president. Norman knew of and did not object to this procedure.

76. Circumstantial evidence, the fact that Fred Barton was a friend of and obligated to Rev. Bill Beeny for his selection as manager of Station KICM and the extent to which the religious broadcasts of Rev. Beeny and other ministers made it possible for Station KICM to remain on the air, creates the inference that Rev. Beeny and Voice of Reason, Inc. may have exercised day-to-day control over Station KICM. Such circumstantial evidence and the inferences which may be drawn therefrom, however, are not sufficient to overcome the direct probative evidence that the change of managers from Jensen to Barton and the subsequent activities of Barton as manager were all with the knowledge, approval and consent of George I. Norman, Jr. who asserted his authority as licensee shortly after Barton arrived at Station KICM. The probative evidence of record warrants the conclusion that the licensee did not surrender day-to-day control over Station KICM during the period July 14, 1968 through March 26, 1969.

The financial qualifications issue—issue 4

77. In its application for temporary and permanent authority to operate Station KICM, Golden, Colorado, BP–18553, filed April 2, 1969, the applicant estimated that the cost of construction and first-year operation would be $91,000 as follows: Legal, engineering and miscellaneous expenses—$6,000; cost of equipment—$10,000; and estimated first-year operating costs—$75,000. Estimated first-year revenue was placed at $100,000. The cost of equipment, $10,000, was the sum which the applicant estimated it would have to pay for the station equipment which at the time was being held for sale by the FDIC as Receiver in Bankruptcy. It was stated that new equipment, including installation, would cost approximately $32,000.

78. The funds with which to meet the estimated costs of construction and first-year of operation were shown in Exhibit 2 of the application. This exhibit purported to be the balance sheet of Voice of Reason, Inc. as of February 28, 1969. Under plan of financing, the applicant "pledges that it will sell or encumber any or all of its assets set forth in Exhibit No. 2 if necessary to carry out its commitments herein."

79. Three financial statements have been submitted to the Commission to establish that the applicant was financially qualified to operate Station KICM. One statement, dated June 22, 1968, was submitted when Voice of Reason, Inc. sought temporary authority to operate Station KICM. This financial statement was listed as that of the Gospel Revival Hour. The second, dated February 28, 1969, was submitted when Voice of Reason, Inc. filed its application for construction permit. The third, dated September 10, 1970, was submitted in this hearing. The financial statements dated February 28, 1969, and September 10, 1970, purported to show the financial condition of Voice of Reason, Inc. These two financial statements and the statement of June 22, 1968, rearrange by consolidating certain items under appropriate headings, are as follows.

	June 22, 1968 BB Exhibit 44	Feb. 28, 1969 Application for Construction Permit	Sept. 10, 1970 KICM Exhibit 26
Statement of	Gospel revival hour	Voice of Reason	Voice of Reason
Assets—current:			
Cash in bank	$14,753	$4,500	$3,200
Savings account		41,000	[1] 6,000
Accounts receivable		3,100	21,688
Total current assets	14,753	48,600	30,888
Assets—fixed:			
Missouri Youth Ranch:			
100 acres	[2] 128,000	100,000	100,000
Buildings		60,000	64,000
Furnishings	3,000		
320 acres, Warren Co., Mo.	[3] 3,000		92,200
320 acres, Canada			16,100
Church building, St. Louis, Mo.			50,000
Two houses, Wright City, Mo.			26,300
Mobile homes		11,000	9,200
Vehicles	8,200	8,600	8,900
Office and radio equipment	8,530	10,500	11,200
Miscellaneous	9,100		
Total fixed assets	159,830	190,100	377,960
Total assets	174,583	238,700	418,848
Liabilities:			
Accounts payable		1,800	2,100
Mortgage buildings		35,000	42,300
Mortgage mobile homes		5,100	6,510
Mortgage vehicles		1,500	5,100
Total liabilities		43,400	56,010
Capital—net worth	174,583	195,300	362,838

[1] Shown as cash in safety deposit.
[2] Includes land and buildings.
[3] Escrow deposit to purchase the 320 acres adjacent to Missouri Youth Ranch.

80. The Hearing Examiner finds no fault with the fact value placed on any of the numerous identified items in each of the three financial statements. There are, however, numerous major deficiencies in the financial statements of February 28, 1969 and September 10, 1970, each of which purports to reflect the assets of Voice of Reason, Inc.

81. As shown in paragraph 24, *supra*, Voice of Reason, Inc. is a Colorado not-for-profit corporation. This corporation was established for the primary purpose of acquiring Station KICM which was to have been the base or home station used by Rev. Bill Beeny in his radio broadcasting activities.

82. The Gospel Revival Hour is a Missouri not-for-profit corporation created for the purpose of dispensing the gospel and doing an amount of social work with underprivileged children at the Missouri Youth Ranch (see paragraph 27, *supra*). The Gospel Revival Hour is not a church in that it has no congregation. In lay terms, the Gospel Revival Hour is the radio voice of Rev. Bill Beeny which at the time of the hearing was being heard on some 51–52 broadcast stations located in various communities in the United States.

83. Rev. Bill Beeny is the pastor of Freedom Baptist Temple with church building located at 4249 Gibson Street, St. Louis, Missouri. Freedom Baptist Temple is not a corporation. It is an autonomous organization not controlled by any national organization. The pastor and the trustees are elected after a thirty-day notice at a meeting by the vote of three-fourths of a quorum attending. The pastor may be dismissed after thirty days' notice and by vote of three-fourths of the quorum voting for dismissal.

84. The business end of the Freedom Baptist Temple is handled by trustees elected as shown above. The present trustees are Rev. Beeny and Mrs. Delores Estes. A third trustee, Mr. Walter Lipskoch, resigned because of the distance he lived from the church.

85. The trustees may recommend the sale of church assets, but such sale must be approved by a vote of the whole congregation which is recorded in the minutes of the meeting at which the sale is approved. The bulk of the funds available to Freedom Baptist Temple results from the religious broadcasting activities of Rev. Beeny.

86. Rev. Beeny testified that "Freedom Baptist Temple could be perhaps classified as the parent organization that funded and backed Voice of Reason. Voice of Reason recently became a corporate entity which had no previous funding nor income so there had to be a source for it to have this income." and that Voice of Reason, Inc. was established for the "purpose of the purchase of a radio station." (Tr. 730)

87. In an affidavit executed October 6, 1970, Rev. Beeny, after listing the above-identified entities, explains their activities and relation to each other as follows: (KICM Ex. 34)

"Affiant states generally that the enterprises identified in this Affidavit are all recognized to be operational only for the limited purpose of raising funds primarily from free will offerings and donations to be used strictly for charitable and religious purposes without profit, as such, to any individual or enterprise involved in these activities. All enterprises are operated by or through a Board of Directors or Board of Trustees which in all instances are interchangeable and identical. This affiant is the Chairman and Chief Executive of each Board and

has been delegated all possible authority and responsibility for the maintenance and operation of these enterprises and the religious and charitable activities for which they were founded and continue to exist. The Gospel Revival Hour has in the past served as a fund raising and asset holding enterprise for these activities. Freedom Baptist Temple is now the asset holding and fund raising primary enterprise. Voice of Reason, Inc., was established as a Colorado Not For Profit Corporation in order to have a separate and distinct existence as the applicant and licensee for the Radio Station KICM.

"Voice of Reason, Inc., was determined to be the best available enterprise for the purpose of religious oriented broadcasting in order to accomplish the fund raising, charitable, missionary and related religious activities of all of the enterprises generally identified with Freedom Baptist Temple. It has been duly agreed, acknowledged and noted in all revelant [sic] records of Gospel Revival Hour, Inc., and Freedom Baptist Temple that the assets and income of these enterprises are fully and totally and immediately available upon demand of Voice of Reason, Inc., to support Voice of Reason, Inc., in the acquisition, maintenance and promotion of KICM Radio. It is further fully agreed, acknowledged and duly documented in the books and records of these various enterprises that Voice of Reason, Inc., requires the irrevocable use of assets necessary to establish and fund KICM Radio as a broadcast facility in compliance with all applicable Statutes, Rules and Regulations administered and enforced by the Federal Communications Commission."

88. At the evidentiary hearing on September 28, 1970, Rev. Beeny testified that the Gospel Revival Hour was dissolved in 1969 after having been in existence for roughly 10 years and that on dissolution the corporate assets were conveyed to Freedom Baptist Temple. (Tr. 744–745 and Tr. 749)

Erroneous identification of legal entity owning assets identified in financial statements

89. Errors in listing assets shown in the Voice of Reason, Inc. balance sheets of February 28, 1969 and September 10, 1970 are as follows:

a. Prior to September 16, 1970, legal title to the 320 acres of land in Warren County, Missouri, immediately adjacent to the Missouri Youth Ranch was in the name of the Gospel Revival Hour. On September 16, 1970, the Gospel Revival Hour by quitclaim deed conveyed title to these 320 acres to Freedom Baptist Temple. It is not shown that legal title to these 320 acres has ever been in Voice of Reason, Inc.

b. Legal title to two houses in Wright City, located some 60 miles from St. Louis, Missouri, valued at $26,300 is in the name of Freedom Baptist Temple, not Voice of Reason, Inc.

c. Legal title to the 320 acres of land in Canada valued at $16,000 is in the name of Freedom Baptist Temple, not Voice of Reason, Inc.

d. Legal title to the several mobile homes valued at $9,200 is in Freedom Baptist Temple, not Voice of Reason, Inc.

e. Legal title to the office and radio equipment valued at $11,200 is in the name of Freedom Baptist Temple, not Voice of Reason, Inc.

f. The greater part of the current assets were first those of the Gospel Revival Hour and thereafter those of Freedom Baptist Temple.

90. Rev. Beeny, on September 28, 1970, testified that legal title to the church building located at 4249 Gibson Street, St. Louis, Missouri, had been conveyed to Voice of Reason, Inc. in 1969. Beeny also testified that the membership of the Freedom Baptist Temple had decided to relocate the church because of certain neighborhood changes and had an executed money contract to sell the church building for $49,000.

91. The above testimony raises a number of unanswered questions. How could the membership of an unincorporated Missouri church or legal entity contract to sell real property, title to which is held by a Colorado corporation? What entity, the church or Voice of Reason, Inc., will get the $49,000 sale price? What obligation, if any, exists to replace the existing church with another building? If an obligation to replace does exist, is it the obligation of Freedom Baptist Temple or of Voice of Reason, Inc.? No documentary evidence was offered in this hearing which could answer these questions.

92. As shown in prior paragraphs, the Gospel Revival Hour on July 10, 1968, conveyed to Voice of Reason, Inc. by quitclaim deed title to the Missouri Youth Ranch. On the same date, July 10, 1968, Voice of Reason, Inc. executed a Deed of Trust conveying title to the Missouri Youth Ranch in trust to secure the payment of a note in the principal sum of $60,430.59 which was delivered to the Rocky Mountain Bank on July 12, 1968. It appears from a Certificate of Title that the Deed of Trust was filed for record on July 12, 1968. As of the date of said certificate, January 29, 1970, title to the Missouri Youth Ranch was vested in Walter Lipskoch, Delores Estes and Bill Beeny, trustees for the Freedom Baptist Church,[2] title having been conveyed to said trustees by quitclaim deed dated April 15, 1969, subject to the Deed of Trust to secure the payment of the $60,430.59 note to the Rocky Mountain Bank, Book 138, page 437.

93. The financial statements of Voice of Reason, Inc. are deficient in that they fail to identify or list obligations of the applicant. To be specific:

a. Neither the financial statement of February 28, 1969, nor of September 10, 1970, reflects the previously mentioned obligation of Voice of Reason, Inc. on the $60,430.59 note of July 12, 1968, which was secured by the Deed of Trust. Rev. Beeny seeks to justify this omission on the ground that it was not a valid obligation having been obtained by fraud and deceit.

b. A number of bills had been presented to Voice of Reason, Inc. for sums purportedly due for obligations incurred when Voice of Reason, Inc. was operating Station KICM. These are not shown as liabilities. Rev. Beeny seeks to justify this omission by saying that parts of these obligations are those of George I. Norman, Jr., the former licensee.

c. There are, or at least were, certain liens on the Missouri Youth Ranch and the 320 acres adjacent thereto for unpaid taxes on the properties. Rev. Beeny contends that these were in error as the

[2] The granter and holder of title should have been identified as Freedom Baptist Temple (see KICM Ex. 32, paragraph 96, *infra*).

properties used for religious and charitable purposes were not subject to tax and hence the bills were not valid obligations.

94. KICM Ex. 31 is a decree of the Circuit Court of Warren County, Missouri, dated September 10, 1970, in the case of The Gospel Revival Hour vs. Voice of Reason, Inc., No. 1713, wherein the court found that "plaintiff is vested with a fee simple title to the real estate described in the petition, to-wit, [then follows a legal description of the property previously identified in this record as the Missouri Youth Ranch]" and that the defendant "has no right, claim or interest in the real estate or title whatsoever, either legal or equitable in or to said real estate or any lien thereon, . . ."

95. KICM Ex. 33 is a quitclaim deed executed September 11, 1970, wherein Voice of Reason, Inc. conveyed to Freedom Baptist Temple the real property identified in this hearing as the Missouri Youth Ranch.

96. KICM Ex. 32 is a quitclaim deed executed September 16, 1970, wherein the Gospel Revival Hour conveyed to Freedom Baptist Temple title to the real property identified in this hearing as the Missouri Youth Ranch. This deed was executed to correct the deed of April 15, 1970 wherein the grantee had been erroneously identified as Freedom Baptist Church.

97. The documentary evidence of record summarized above raises a number of questions. To be specific:

a. If Gospel Revival Hour was dissolved in 1969 and all assets conveyed to Freedom Baptist Temple, how could the Gospel Revival Hour prosecute a suit to establish that it held *fee simple title* to the Missouri Youth Ranch as of September 10, 1970?

b. When and by what means was the Deed of Trust dated July 10, 1968, filed of record July 12, 1968, wiped out?

c. When and by what means did Voice of Reason, Inc. convey title to the Missouri Youth Ranch to either the Gospel Revival Hour or Freedom Baptist Church?

d. If Walter Lipskoch, Delores Estes and Rev. Bill Beeny as trustees for Freedom Baptist Church or Temple held title to the Missouri Youth Ranch as of April 15, 1969 subject to the Deed of Trust, when and by what means was title conveyed by them to the Gospel Revival Hour to justify the Warren Circuit Court holding that as of September 10, 1970 the Gospel Revival Hour had a *fee simple title* to the Missouri Youth Ranch?

98. Rev. Beeny's contentions that the $60,435.59 note of July 12, 1968 and the Deed of Trust given to secure the same are not obligations of Voice of Reason, Inc. are without merit. Until a court having jurisdiction to hear and decide Rev. Beeny's contentions has rendered its decision invalidating the obligations, they remain legally binding on the applicant.

99. Rev. Beeny's contentions that Voice of Reason, Inc., the Gospel Revival Hour (a corporation) and Freedom Baptist Temple are essentially one and the same and should be so recognized by the Commission are without merit. Each is a separate entity; each has its own officers, directors and trustees; each is recognized by this Commission as hold-

ing legal title to its own individual assets. The applicant can commit, for the use of Station KICM, only such assets as are authorized by appropriate action taken by the party or parties having such authority. Authority of the applicant to use the assets of either the Gospel Revival Hour or of Freedom Baptist Temple has not been submitted to the Commission.

100. The courts of the State of Missouri, not this Commission, determine what person or entity has legal title to assets within the jurisdiction of said state and whether any or all of said assets are subject to taxation. This Commission recognizes as valid liens for unpaid taxes on real property until such liens are set aside and voided by competent authority.

Summary findings

101. As of the date of the close of this record, the applicant, Voice of Reason, Inc., held few, if any, liquid or fixed assets in its own name. On such date the applicant was obligated on a $60,439.59 note for which it was being sued by the FDIC for the unpaid balance. It owed all or parts of other obligations identified in the basic findings. It is impossible to ascertain, on the basis of this record, what unencumbered assets, if any, are owned by Voice of Reason, Inc., or the full amount of its obligations or liabilities.

102. It may be that other legal entities with which Voice of Reason, Inc. and its president, Rev. Bill Beeny, are affiliated are financially qualified to advance funds for the construction and operation of the proposed station, but it cannot be ascertained from this record which entity holds title to what properties or the extent of its legal obligations.

103. Neither in the application of Voice of Reason, Inc. for authority to operate Station KICM nor in any place in this record is there any written representation duly executed by the officers, directors or trustees of either the Gospel Revival Hour or Freedom Baptist Temple that the funds of such entity are or will be available to Voice of Reason, Inc. for the construction and operation of the proposed station. Neither the personal affidavit of Rev. Bill Beeny nor his sworn testimony can or does cure this omission.

104. The frequency with which fixed assets have been shifted from one legal entity to another by quitclaim deed raises the question of the financial stability of such entities. It may be that this question has an answer, but it cannot be found in the evidence of record.

105. On the basis of the evidence of record, Voice of Reason, Inc. has failed to establish that it is financially qualified to construct and operate the proposed station.

The ex parte issue—Issue 2

106. Sometimes after February 11, 1970 when the FCC denied a petition to reconsider its previous action setting the application of Voice of Reason, Inc. for hearing, a leaflet was prepared and sent by Voice of Reason, Inc. to thousands on its mailing list. Such leaflet was distributed at meetings conducted by Rev. Beeny. This leaflet, or the suggestions contained therein, was read by Rev. Beeny in his broadcasts. This leaflet reads, in part:

"F.C.C. *DENIES* KICM PETITION TO *GO BACK ON THE AIR!* FIGHT MUST BE TAKEN TO *INTO U.S. COURT OF APPEALS WE NEED CHRISTIANS TO JOIN THIS FIGHT BY SENDING YOUR GIFT TODAY!*

"On December 17th we filed a petition for reconsideration . . . The FCC *DENIED* . . . FCC chairman, Dean Burch also voted to keep us off the air! We URGE EVERYONE OF YOU TO WRITE HIM A LETTER DEPLORING THIS ACTION. WRITE TO DEAN BURCH, FCC CHAIRMAN, WASHINGTON.

* * * * * * *

"Since the FCC is determined to stop Christian broadcasting we must take this case into the U.S. Court of Appeals. Our chance of winning once we get into court is very very good. WE NEED THE FUNDS TO BE ABLE TO GO INTO COURT. EVIDENTLY THE FCC FEELS WE CANNOT AFFORD FINANCIALLY TO TAKE THIS INTO COURT. *PLEASE HELP US PROVE THEM WRONG!*"

107. Prior to taking the stand on September 29, 1970, Rev. Beeny had inspected the FCC public files and found that "the letters from the public in response to this letter were there in great numbers," and that "Some of these letters as I scanned them yesterday were in response to our radio broadcasting which we began immediately after we were taken off the air on the 28th of October." (Tr. 827–828) Rev. Beeny and his counsel stated that all or substantially all of such letters were addressed to a Commissioner or to the Chairman. (Tr. 830–831) Rev. Beeny accepts full and complete responsibility for the leaflet, its distribution and resulting letters to the Commissioners.

108. Section 1.225 of the Commission's Rules specifies how and in what manner a person not a party to a pending application which has been designated for hearing may appear and give evidence at the hearing. Sub-paragraph (c) provides, in part, that "When a hearing is held, no communication will be considered in determining the merits of any matter unless it has been received into evidence."

109. It is improper for an applicant or any party to a proceeding which has been designated for hearing to approach, directly or indirectly, the Hearing Examiner to whom the case has been assigned, any member of the Review Board or any individual Commissioner concerning the merits of the case except in pleadings duly filed, copies of which have been served on all parties. The same rule of conduct should be observed by nonparties. Any communication, oral or written, to those upon whom rests the legal obligation to hear and decide the case on its merits which is not made in duly filed pleadings or on the hearing record is known as an ex parte communication. It is improper for an applicant or a principal to request another or others to intercede, directly or indirectly, with any person charged with deciding the case on its merits except in duly filed pleadings or as a witness. The fact that letters and telegrams sent to those charged with deciding a case on its merits are placed in the public files of the Commission does not obviate the fact that such communciations are ex parte.

110. A distinction is made between letters and other written communications addressed to the Secretary of the Commission or merely to the Commission which, upon receipt, are placed in the public files of the Commission and those communications which are addressed to those individuals who have the obligation of deciding a case on its merits.

111. It would have been proper and permissible for Voice of Reason, Inc. to have assembled various letters and communications and, thereafter, have submitted them to the Commission with an appropriate pleading. This procedure was not followed. Voice of Reason, Inc. and its president urged numerous persons to write directly to Dean Burch, FCC Chairman, Washington, D.C. The obvious purpose of such procedure was an effort to "pressure" the Chairman in this adjudicatory proceeding.

Summary finding

112. Voice of Reason, Inc. and its president are found to have initiated and urged the writing of numerous ex parte communications to the Chairman of the Federal Communications Commission. The applicant and its president are responsible for such ex parte communications.

The misrepresentation issue—Issue 3, and the failure to amend issue—Issue 5

113. Section 1.65 of the Commission's Rules requires an applicant to amend its pending application whenever the information therein is no longer substantially accurate and complete in all significant respects. Such amendment is to be filed as soon as possible and in any event within 30 days unless just cause for the delay is shown to exist.

114. The failure to amend issue as required by Rule 1.65—Issue 5—was adopted by the Review Board for the reason that the applicant had failed to amend its application to reflect the fact that it was obligated on a promissory note in the face amount of $60,430.59 and had been sued to collect the unpaid balance, $58,423.15, due on said note.

115. The existence of this obligation and the fact that this note was secured by a Deed of Trust on the Missouri Youth Ranch led to the adoption of the Review Board of the financial qualification issue—Issue 4—and the misrepresentation issue—Issue 3.

116. The details relating to the execution of the note in the amount of $60,430.59, the Deed of Trust to secure the same, and the deficiencies in the financial statement submitted by the applicant when it filed the instant application have been previously detailed.

117. Prior paragraphs have also detailed the deficiencies found to exist in the applicant's financial statement of February 28, 1969 submitted with its application as well as in the financial statement of September 10, 1970 submitted at the hearing.

Summary findings

118. The applicant failed to amend its pending application to reflect material and significant changes in its financial qualifications as is required by Section 1.65 of the Commission's Rules.

119. The financial statement submitted by Voice of Reason, Inc. when it filed the application here involved was inaccurate. By far the greater part of the assets represented to the Commission as being the assets of Voice of Reason, Inc. were owned by another legal entity, not by Voice of Reason, Inc. It is neither the duty nor the obligation of this Commission to assume that some other legal entity may come

to the financial assistance of the applicant. The belief of the applicant's president that financial assistance will come, if and when needed, is not a substitute for full and complete honesty in representations to this Commission. The financial statements as filed misrepresented the financial condition of the applicant on the dates such statements were submitted to the Commission.

CONCLUSIONS

1. In this proceeding, Voice of Reason, Inc., a not-for-profit Colorado corporation, seeks a permit to construct and operate a standard broadcast station to operate on 1250 kc, 1 kw, DA, daytime only, at Golden, Colorado.

2. The issues with which the applicant is confronted have been listed in paragraph 8 of the preliminary statement.

3. In early June 1968, Rev. Bill Beeny, a Baptist minister, was asked by another or other ministers if he would be interested in acquiring the facilities of Station KICM, Golden, Colorado. Rev. Beeny, who at the time was broadcasting on some 50-odd radio stations, was interested. After visiting Golden, he decided he wanted to acquire Station KICM if at all possible. Details of how, why and in what manner he became involved in Station KICM are outlined in paragraphs 14 through 76 of the basic findings and need not be summarized here.

4. The problems with which Rev. Bill Beeny and Voice of Reason, Inc. have been confronted are due almost entirely to the fact that neither Rev. Beeny nor his St. Louis attorney have little more than a superficial knowledge of broadcasting terminology and the rules and regulations of the Federal Communications Commission. If in early June of 1968 Rev. Beeny had employed an attorney with a working knowledge of broadcast terms and the Commission's rules, such an attorney, after checking the Commission's public files on Station KICM, could have told him that the license of Station KICM was in jeopardy and that the acquisition of such license by assignment without an evidentiary hearing was exceedingly doubtful.

5. It is clear to the Hearing Examiner that in June of 1968 neither Rev. Beeny nor his St. Louis attorney knew or understood the difference between a contract to purchase the "hardware" of a broadcast station and an "Agreement of Employment" or "management contract" which would place the "employee" or "manager" in the position of an independent contractor exercising day-to-day control of the station regardless of one or more clauses reserving to the licensee the ultimate power to control the station.

6. It is likely that this hearing would never have been held had Rev. Beeny and his St. Louis attorney understood what FCC practitioner Marcus Cohn had told them in their meeting of July 24, 1968 and his letter of August 1, 1968 and had immediately delivered to the Commission a full, complete and readily understandable document explaining how, why and to what extent Voice of Reason, Inc. was then involved in the purchase of station "hardware" and the operation of Station KICM. Although Voice of Reason, Inc., through its attor-

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ney, did on November 19, 1968 forward to the Commission copies of the drafts of the June 17, 1968 "Lease and Purchase Agreement" and the undated "Agreement of Employment," there was not associated with such papers a detailed explanation of the involvement of Voice of Reason, Inc. in the activities of Station KICM. Absent such detailed explanation, the two documents appeared to be just another of the numerous "proposals" of the licensee to "sell" Station KICM to another unsuspecting "purchaser" and the improper involvement of the proposed "purchaser" in the operation of the station.

7. The applicant and its St. Louis attorney appear not to understand the duties and obligations of the staff of the Broadcast Bureau vis-a-vis the duties and obligations of an applicant. When, after an application has been designated for hearing, information comes to the attention of Bureau counsel which, if not explained, would cast doubt on the qualifications of the applicant to become a licensee, it is the duty and obligation of Bureau counsel to petition or request that the matter or matters be placed in issue to be resolved in the evidentiary hearing. In this proceeding, certain matters, on petition of the Broadcast Bureau, were placed in issue. Bureau counsel, which raised the issues, had the duty of going forward with the introduction of the evidence in question. After this information was introduced, the burden shifted to the applicant to establish that it is qualified to receive the license. It is the duty and obligation of the applicant to establish that he or it is qualified to become a licensee.

ULTIMATE CONCLUSIONS

8. The Commission's main concern under Issue 1 is whether Rev. Beeny or Voice of Reason, Inc. did, in fact, assume and exercise control of Station KICM without prior Commission consent. No "Agreement of Employment" or "management contract" was signed by the licensee. Rev. Beeny may have wanted to exercise control over Station KICM on and after July 14, 1968 but any idea that he, Beeny, Barton or Voice of Reason, Inc. was actually in control was shattered within the next few days when Norman asserted his authority. Any idea that Beeny could legally exercise control over Station KICM through the proposed unsigned "management agreement" was dispelled when he and his attorney met with attorney Marcus Cohn on July 24, 1968. The duly authorized licensee did not surrender control of Station KICM to either Fred Barton, Rev. Beeny, Greater Leasing Company or Voice of Reason, Inc.

9. Voice of Reason, Inc. did not exercise day-to-day management and control of Station KICM, Golden, Colorado, during the period July 14, 1968 through March 26, 1969 in violation of Section 310(b) of the Communications Act of 1934 and of the Commission's rules. Issue 1 is resolved in favor of the applicant.

10. The Commission's main concern under Issue 4 is whether the applicant, Voice of Reason, Inc., is financially qualified to construct and operate the proposed station as disclosed in its application filed April 2, 1969. As shown in paragraph 77 of the basic findings, the

applicant, in its application, estimated that its first-year cost of operation would be $75,000, legal and engineering costs would be $6,000, and the cost of existing equipment would be $10,000, for a total of approximately $91,000. New equipment, if purchased and installed, would cost approximately $32,000, raising the total to approximately $113,000. As has been shown in paragraphs 89 through 105 of the basic findings, it is impossible to ascertain on the basis of the evidence of record either the assets in the name of the applicant or the extent of its legal liabilities. This fact leads to the conclusion that the applicant has not established that it has or can obtain the funds which would be required to construct and operate for one year the proposed station. The applicant has failed to establish that it is financially qualified.

11. The Commission's main concern under the ex parte issue (Issue 2) and the failure to amend its application to disclose significant and material changes in its financial qualifications issues (Issues 3 and 5) was to determine in the light of the facts developed whether Voice of Reason, Inc. has the requisite qualifications of a Commission licensee (Issue 6). This Commission is a licensing and regulatory agency. The Commission, in its application forms and in its rules and regulations, spells out the requirements required of an applicant for a broadcast facility. This Commission is authorized to grant a broadcast license if, on the basis of facts known to it, it can make the affirmative finding that such grant will serve the public interest, convenience and necessity. The applicant, Voice of Reason, Inc., (a) submitted an erroneous financial statement or balance sheet when it filed its application on April 2, 1969; (b) failed to amend or correct said erroneous financial statement; and (c) urged members of the general public to write ex parte letters intended to "pressure" the Chairman of this Commission in this adjudicatory proceeding. The applicant has failed to establish that it has the qualifications which this Commission requires of a broadcast licensee.

12. In view of the foregoing, it is concluded that an affirmative finding cannot be made that the public interest, convenience and necessity will be served by granting the application of Voice of Reason, Inc.

IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by any of the parties or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Voice of Reason, Inc. for permanent authority to operate Station KICM, Golden, Colorado, on 1250 kc, 1 kw, DA, daytime only, BE and the same IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BASIL P. COOPER,
Hearing Examiner.

F.C.C. 72R-298

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WIOO, INC., CARLISLE, PA.	Docket No. 19468 File No. BPH-6572
HOWARD J. HILTON, JOHN E. McGOWAN, AND JOHN E. HILTON, D.B.A. HILTON, McGOWAN & HILTON, CARLISLE, PA.	Docket No. 19469 File No. BPH-6631
ALEXANDER CONTRACT AND SYLVIA CONTRACT, D.B.A. CUMBERLAND BROADCASTING CO., CARLISLE, PA.	Docket No. 19471 File No. BPH-7404
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted October 16, 1972; Released October 19, 1972)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. This proceeding involves the mutually exclusive applications of WIOO, Inc. (WIOO), Hilton, McGowan & Hilton (Hilton) and Cumberland Broadcasting Company (Cumberland) for a new FM broadcast station at Carlisle, Pennsylvania. The Commission, by Order FCC 72-233, 37 FR 6519, published March 30, 1972, designated these applications for consolidated hearing on various issues. Presently before the Review Board is a petition to enlarge issues, filed July 26, 1972, by Cumberland which requests issues to determine whether Harold Swidler, a WIOO principal, is guilty of criminal fraud in connection with documents presented to the Commission purporting to be affidavits and related misrepresentation, abuse of process and lack of candor issues.[1]

2. A brief statement of relevant portions of the recent history of this proceeding will facilitate an understanding of the basis for the presently requested issues. On July 14, 1972, WIOO filed a supplement to petition to enlarge issues against Cumberland[2] which contained, *inter alia*, letters from three local area real estate brokers and a letter from an assessor of the Cumberland County Board of Assessment and Revision of Taxes, Carlisle, Pennsylvania. All five letters were notarized. Subsequently, by affidavit dated July 21, 1972, the Notary Public withdrew her notarization of the letters after learning

[1] Also before the Review Board are the following related pleadings: (a) opposition, filed August 7, 1972, by WIOO; (b) Broadcast Bureau's comments, filed August 8, 1972; and (c) reply, filed August 17, 1972, by Cumberland.

[2] This supplement was filed in connection with a series of pleadings initially filed on April 14, April 19, and April 26, 1972—all of which were dealt with by Review Board Memorandum Opinion and Order, FCC 72R-255, released September 20, 1972, —— FCC 2d —— (1972). See specifically footnote 7 thereof.

that the county assessor had not authorized notarization of his letter.[3] WIOO subsequently submitted new notarizations of the local area realtors' appraisals and, because of their pertinency to the serious questions then before the Board, the Board considered the substance of those appraisals. Cumberland's present request for enlargement of the issues followed.

3. In support of its petition, Cumberland submits, in addition to the above described July 21, 1972 affidavit of the Notary Public withdrawing her notarizations, an affidavit of the county assessor, in which he states that he "did not have the said letter notarized nor did I authorize him [Mr. Harold Swidler] or anyone else to have the letter notarized." Petitioner contends that the actions of Harold Swidler in this matter require not only misrepresentation, abuse of process and lack of candor issues but also an issue "to determine whether Harold Swidler is guilty of violation of 18 U.S.C. Section 1001 (1970).[4] [5]

4. WIOO opposes all the requested issues on the grounds that each of the letters in question were in fact properly signed and no question has been raised as to the genuineness of any of the statements contained therein. Furthermore, argues WIOO, an "irregularity" in the notarization of letters that were actually signed in good faith, which is all that occurred here, is substantially different from submitting false statements to the Commission. The former is merely a matter of form, argues WIOO, rather than substance, and need not require enlargement. WIOO also opposes the requested issue concerning criminal fraud on the grounds that the Commission is not the appropriate forum for deciding whether a crime has been committed. Finally, WIOO submits the affidavit of Harold Swidler in which he states that he "had no idea there was anything wrong" with asking the Notary to notarize the letters "even though they are not signed in the presence of the Notary" and that "the statements made [in the letter] were those of the individuals concerned" and they "personally signed the documents in my presence." The Broadcast Bureau, in its comments, agrees with WIOO to the extent that the criminal fraud issue is inappropriate because jurisdiction to determine criminal guilt or innocence does not lie with the Commission. The Bureau urges, however, that an issue should be designated to determine whether there was an abuse of process and/or misrepresentation on the part of Mr. Swidler.

5. In reply, petitioner attacks Mr. Swidler's affidavit disavowing knowledge of wrongdoing by contending that even if it is to be believed it is an "admission of misrepresentation." As to the requested

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[3] By her July 21 affidavit, the Notary stated that, her action was taken because "none of these gentlemen [the local area realtors] appeared before me or contacted me in connection with the notarizations" and because she believed that she "can no longer rely on Mr. Swidler."

[4] 18 U.S.C. Section 1001 (1970) reads as follows:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly or willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than 5 years or both.

[5] By letter of August 25, 1972, attorneys for Cumberland notified the Review Board that they had received a letter, dated August 18, 1972, from the United States Attorney's office, District of Columbia, which states that that office would decline criminal prosecution.

issue concerning criminal fraud, Cumberland argues that the crime occurred within the Commission, that the Commission was the "direct victim" of criminal activity, and that, therefore, the Commission ought to be able to determine administratively the facts and circumstances surrounding the crime.

6. The Review Board will add the requested misrepresentation and abuse of process issue. Commission Rule 1.229(c) requires that all motions to enlarge, change or delete issues be supported by affidavits of persons having personal knowledge of the alleged facts. It appears that Mr. Swidler has procured and submitted to this Commission documents which he knew were not affidavits as represented by him, and that the purpose of the conduct was to persuade the Commission into believing that such documents were properly sworn. Inquiry into all the facts and circumstances surrounding both the procurement and submission of such documents is necessary and, therefore, an issue inquiring into the matter will be added. The Board does not believe, however, that the requested issue inquiring into violation of federal law is either proper or necessary. Such a determination more appropriately rests with the federal courts, and, as previously stated, the U.S. Attorney has indicated that he does not intend to prosecute. In any event, the significance of this matter relates primarily to the underlying conduct, and its effect, if any, on WIOO's qualifications to be a licensee, not whether Swidler did or did not technically violate the statute, and the conduct involved can be fully explored under the issues being specified herein.

7. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed July 26, 1972, by Cumberland Broadcasting Company IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

8. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issues:

1. To determine whether Mr. Harold Swidler and/or WIOO, Inc. has made misrepresentations or abused Commission processes or been lacking in candor with respect to documents submitted to this Commission purporting to be affidavits;

2. To determine, in light of the evidence adduced pursuant to the above issue, whether Harold Swidler and/or WIOO, Inc., possesses the basic or comparative qualifications to be a Commission licensee.

9. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the issues added herein SHALL BE on Cumberland Broadcasting Company and the burden of proof under these issues SHALL BE on WIOO, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-274

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WNAR, INC. (WNAR), NORRISTOWN, PA. For Construction Permit	Docket No. 14952 File No. BP-12902

ORDER

(Adopted September 29, 1972; Released October 3, 1972)

BY THE REVIEW BOARD:

1. The Review Board having under consideration the petition for leave to amend application pursuant to Section 1.65 of the Rules to reflect an option to purchase, filed on March 31, 1972, by WNAR, Inc. (WNAR);

2. IT APPEARING, That no objections to acceptance of the amendment have been filed within the time allowed therefor;

3. IT IS ORDERED, That the petition for leave to amend IS GRANTED and the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72R-304

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ROBERT COWAN WAGNER, PINEVILLE, LA.	Docket No. 19473 File No. BP-18465
SOUTHEAST ARKANSAS RADIO, INC., DERMOTT, ARK.	Docket No. 19474 File No. BP-18476
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted October 18, 1972; Released October 20, 1972)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. Presently before the Review Board is a petition to enlarge issues, filed April 14, 1972, by Southeast Arkansas Radio, Inc. (Southeast) which requests the addition of a Suburban Community issue against Robert Cowan Wagner (Wagner).[1]

2. In support of its request, Southeast argues that, pursuant to the Commission's *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 RR 2d 1901 (1965)[2] a "presumption" should arise that Wagner's application is realistically one for Alexandria, Louisiana, which will receive a 5 mv/m signal or better from the Wagner proposal, rather than Wagner's specified city of license, Pineville, Louisiana.[3] Conceding that the Policy Statement presumption technically arises only if the larger city has a population of over 50,000, petitioner goes on to note that the Commission has indicated that this standard is not "inflexible" and that parties attempting to raise the issue would receive favorable consideration if a threshold showing could be made that the proposal would realistically afford primary service to a community other than the one specified, citing *Harry D. Stephenson and Robert E. Stephenson*, 15 FCC 2d 345, 14 RR 2d 945 (1968). After noting the disparity in population and that the cities are virtually contiguous, Southeast argues that the cities are part of a unified area,

[1] Also before the Review Board are the following related pleadings: (a) opposition, filed May 18, 1972, by Wagner; and (b) Broadcast Bureau's comments, filed May 18, 1972.

[2] Therein, the Commission stated, *inter alia*, that where an applicant's 5 mv/m daytime contour would penetrate the geographic boundaries of a community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community, a presumption would arise that the applicant realistically proposes to serve the large community rather than his specified community.

[3] According to the 1970 U.S. Census, Alexandria has a population of 41,557 while Pineville has a population of approximately 9,000.

as exemplified by the fact that the area is served by the same airport, electric company, and banks, as well as by the fact that the two cities attempt to hold themselves out to be a unified area (as shown by a publication distributed jointly by the Alexandria-Pineville Chamber of Commerce). Finally, asserts petitioner, a Pineville station would be dependent on listeners and revenue from the larger city and this would be complicated by the five radio stations presently operating in Alexandria.

3. Both Wagner and the Broadcast Bureau oppose the requested issue. Wagner initially challenges petitioner's population statistics [4] as misleading because the "restricted city limits" of Pineville do not accurately reflect the population of the greater Pineville area; the contiguous area of Pineville, with the inclusion of "Wards 9 and 10", constitutes a population of 28,463—approximately 70% of the population of Alexandria. Wagner also submits numerous statistical data in support of its contention that Pineville is separate from Alexandria on geographical, economic, civic and social bases, noting, *inter alia*, that the cities are separated by the Red River and connected only by bridges, that recent rapid industrial development has occurred in Pineville with various national companies establishing large plants in the area, that Pineville has a complete and totally independent municipal organization, a separate school system, shopping areas and business section, and that numerous civic clubs exist in Pineville that are not connected with Alexandria in any manner. Wagner also alleges that Pineville has needs and interests separate from Alexandria and that such needs are not now being met by existing stations. In support, Wagner relies, in part, on his survey of community needs and interests to detail such distinctive needs, which include problems of extremely rapid growth, a local hospital, and improved and new roads.[5]

Finally, both Wagner and the Broadcast Bureau oppose the requested Suburban Community issue on engineering grounds, arguing that Wagner's proposal is not directed to Alexandria because the proposed antenna site is to the north of Pineville and away from the city of Alexandria, the radiation pattern is omnidirectional and a reduction of power would result in a lack of the required signal strength in the industrial section of Pineville.[6]

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[4] Wagner also disputes two other Southeast assertions, alleging that electrical power is not supplied to both cities by a single company, but rather by a "municipal electric system" in Alexandria and a "private utility" in Pineville, and that, while both cities are served by the same commercial airport, that airport serves eight to ten parishes in central Louisiana.

[5] Wagner also alleges that Pineville's only local newspaper has recently gone out of business and that, therefore, there is an increased need for a local medium to inform residents of the various local activities.

[6] Commission Rule 73.188(b)(1) requires that a "minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city".

4. The Review Board will deny the requested Suburban Community issue. Although the requirement that the larger city have a population of 50,000, as described in the Policy Statement, *supra*, is not an "inflexible standard", where the presumption does not arise the burden on a petitioner to make a threshold showing of service to a city other than the one specified is not a light one, *V.W.B. Inc.*, 8 FCC 2d 744, 10 RR 2d 563 (1967). Here, petitioner has not in our view made the required threshold showing that Wagner's proposal will realistically serve Alexandria rather than Pineville. Initially it is to be noted that the mere presence of a strong signal over a large community, standing alone, is not sufficient to warrant a Suburban Community issue. *Centreville Broadcasting Co.*, FCC 71R–62, 21 RR 2d 216; and *Resort Broadcasting Co.*, 30 FCC 2d 440, 22 RR 2d 191 (1971). Petitioner's allegations stand for little more. Indeed, even though the Board does not consider Wagner's allegations concerning the area outside the "restricted city limits" to be sufficiently documented to be relied upon, the population disparity between Alexandria and Pineville proper is not of itself of sufficient magnitude to give rise to the need for the requested issue. *Cf. Durgin Associates, Inc.*, 10 FCC 2d 24, 11 RR 2d 205 (1967). In addition, it appears that petitioner's allegations as to the "unity" of the area are at least partially rebutted by Wagner's documentation of the various Pineville social, civic and municipal functions that operate independently of Alexandria. Thus, it appears from the undisputed allegations of Wagner that Pineville has an existence separate and apart from Alexandria, and that the classic city-suburb relationship between the two communities does not exist. In reference to petitioner's allegations concerning the ability of Pineville to supply adequate revenue and listeners, it is noteworthy that there are 28,000 people on the Pineville side of the river and that gross retail sales in Pineville for 1967 totalled $12,700,000. Finally, the Board believes that Wagner's engineering proposal is clearly inconsistent with Southeast's claim that Wagner realistically intends to serve Alexandria rather than Pineville. To begin with Wagner's proposal of 500 watts power does not appear to be excessive for a community of 9,000 people (compare *Summit Broadcasting*, 18 FCC 2d 470, 16 RR 2d 733 (1969); and *Babcom, Inc.*, 12 FCC 2d 306, 12 RR 2d 998 (1968)), and more importantly, a reduction in power would result in an inability to provide the required coverage of Pineville. Moreover, Wagner's proposed site is positioned to the north of Pineville and therefore away from the city of Alexandria and, also, Wagner proposes an omnidirectional pattern rather than a directional pattern aimed at Alexandria. Therefore, in light of all of the above circumstances, the Board concludes

that Southeast has failed to make the required threshold showing and the requested issue will be denied.

5. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed April 14, 1972, by Southeast Arkansas Radio, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
WUAB, INC.
For Advisory Opinion Re Real Estate Advertising

SEPTEMBER 25, 1972.

PETER TANNENWALD, ESQ.,
Arent, Fox, Kintner, Plotkin & Kahn,
Federal Bar Building, 1815 H Street NW., Washington, D.C.

DEAR MR. TANNENWALD: This is in response to your letter of July 26, 1972, on behalf of WUAB, Inc., in which you request an advisory opinion as to whether the broadcast by WUAB–TV of a weekly one-hour program of real estate advertisements would be in the public interest as consistent with Commission programming rules and policy.

You state in that letter that the program would consist of a series of visual slide displays of homes for sale, along with other information, including the name of the real estate broker with whom each house is listed. Viewers would be directed to contact the broker to arrange a personal inspection or to pursue further inquiries. The program would be produced by an independent production company, which would also purchase the weekly one-hour time spot, and the real estate brokers would pay the production company for inclusion of their listings in the program.

You further state that both the production company and the real estate brokers would be identified as sponsors, that the station would log the entire one-hour program as commercial matter, and that the licensee would amend its stated commercial policy to reflect and account for such logging variation. In this regard, you note that while "WUAB recognizes the Commission's concern with the problem of overcommercialization in the broadcast media. . . . ", "it believes that its proposed program is very much in the public interest and is not the kind of commercial which troubled the Commission [in previous cases]. . . ." Thus, in essence, you request an opinion approving the proposed program as being in the public interest, notwithstanding its primarily commercial content.

In *Letter to American Broadcasting Co.*, 21 FCC 2d 148 (1969), the Commission ruled that where a program promoted the product of one of the network's major advertisers in title and, in part, in content, part of such program content was commercial and was required to be logged accordingly. In this and subsequent rulings in this area, the Commission has made it clear that its difficulty with such merging of commercial advertising and program content extends beyond issues of

sponsor identification and logging requirements. As the Commission stated in *KCOP–TV, Inc.*, ("100 Paintings" and "Great Moments in Music"), 24 FCC 2d 149 (1970):

> We have dealt only with the question of the amount of commercial time to be logged, but there is a more important question in all of these cases. That question is whether there is a pattern exhibited by the licensee which may "subordinate programming in the interest of the public to programming in the interest of saleability." As we have made clear, a pattern of presenting program-length commercials or programs with respect to which other factors indicate that the licensee is disregarding the interest of the public in its programming will be considered as raising questions as to whether the licensee is operating in the public interest. *Id.* at 151.

The program proposed by WUAB–TV is admittedly and on its face a sixty-minute commercial designed to promote the sale of houses listed with the sponsoring real estate brokers. In attempting to distinguish such programming from prior Commission rulings, you urge that the program would be in the public interest in that "the desire to own a home is an American tradition. . . ." and that as a result of such programming, "prospective purchasers will be able to make more informed decisions as to which homes to visit personally." The Commission, however, has rejected such arguments of incidental benefit to the public interest where the program content is commercial and its focus principally one of saleability. In *Columbus Broadcasting Co., Inc.*, 25 FCC 2d 56 (1970), the Commission dealt with a program about real estate development in Port Malabar, Florida which interwove explicit commercial messages with a tourist narrative of points of interest in the area. The licensee contended that the program matter combined elements of entertainment, travel, and information and was therefore sufficiently tinged with the public interest to escape commercial logging requirements. In rejecting this contention and ruling the entire program commercial, the Commission stated:

> To the contrary, we are of the opinion that the entire program was designed to encourage the viewer to invest in Port Malabar. . . . [T]here is no difference between program content and the sponsor's sales message. . . . [T]he presentation of such programming is plainly inconsistent with the public interest. *Id.* at 57–58.

Similarly, in *Multimedia, Inc.*, 25 FCC 2d 59 (1970), the Commission rejected the argument that a program presenting and promoting the Evelyn Wood speed reading course was in the public interest as ". . . devoted essentially to a discussion of rapid reading and its value in dealing with the complexities and tempo of modern life." After finding that ". . . the entire film was designed and had as its purpose the effect of persuading the public to take the speed reading course," the Commission emphasized that "the presentation of such programming is inconsistent with the public interest." 25 FCC 2d at 60–61.

A review of the proposed script for your program clearly reveals that any element of bona fide public interest is at best wholly incidental to the predominant commercial interests represented. The format calls for the advertisement of "more than 60 different homes, condominiums and apartments" in a single sixty-minute program.

This fast-paced, hard-sell approach is further exemplified by the announcer's sales presentation which accompanies the visual slides of the houses advertised:

> **Look at what the Lion's from Leo have this week!!!!!! This lovely Georgian bi-level is situated on a sprawling treed lot with gas light in the front and gas grill in the rear. Inside you will find 4 bedrooms, the master bedroom is 20x20. That's right 20x20!! More. . . . 2 and a half baths, new carpeting, drapes, kitchen with built ins and disposal, AM/FM radio in all rooms, bar in the family room, humidifier, incinerator and more. This is truly living at its finest . . . The price for all this???? Much less than you might think. Call the Lions from Leo and let them show you a place to live. [To next slide and description.]**

While there may be incidental informational value in an uninterrupted hour of sixty or more such advertisements, it is readily apparent that such a program is premised more upon the interests of saleability than upon the interest of the public. Like the "Port Malabar" and "Evelyn Wood" films, the proposed program appears to be designed primarily to sell, and only secondarily to serve any broader public interest in "the American tradition" of home ownership. Falling squarely within these prior rulings of the Commission, it cannot be said that such programming is consistent with the public interest.

Finally, your reliance upon the Commission's ruling in *McLendon Pacific Corp.*, 7 RR 2d 653 (1966), is noted but considered inapposite to the issue here presented. There an FM station was authorized, under certain conditions and solely on an experimental basis, to broadcast programming consisting of "classified ads" for a trial period of one year. The Commission made it clear, however, that the temporary authorization represented no change in its basic policies in this area.

For the above reasons, your request for an opinion that the proposed program would be in the public interest must be denied.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating factors warranting consideration.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
for Chief, Broadcast Bureau.